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INDIANA REPORTS.

VOLUME XXXI.

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. XXXI.

CONTAINING THOSE CASES DECIDED AT THE MAY TERM, 1869,
NOT PUBLISHED IN VOL. XXX., AND SOME OF THE CASES
DECIDED AT THE NOVEMBER TERM, 1869.

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J U D G E S
OF THE
SUPREME COURT OF JUDICATURE.

DURING THE TIME OF THESE REPORTS.

JEHU T. ELLIOTT, LL. D.*

JAMES S. FRAZER, LL. D.†

ROBERT C. GREGORY, LL. D.

CHARLES A. RAY, LL. D.

*Chief Justice at the May Term, 1869.

†Chief Justice at the November Term, 1869.

JUDGES
OF THE
CIRCUIT COURTS.

1st Circuit,	HON. JOHN G. BERKSHIRE.
2d "	HON. GEORGE A. BICKNELL.
3d "	HON. JOHN BAKER.
4th "	HON. JEREMIAH M. WILSON.
5th "	HON. CYRUS C. HINES.
6th "	HON. DELANA R. ECKLES.
7th "	HON. JOSEPH S. BUCKLES.
8th "	HON. JOHN M. COWAN.
9th "	HON. ANDREW L. OSBORN.
10th "	HON. ROBERT LOWRY.
11th "	HON. HORACE P. BIDDLE.
12th "	HON. CHARLES H. TEST.
13th "	HON. SILAS COLGROVE.
14th "	HON. HIRAM S. TOUSLEY.
15th "	HON. JAMES G. JONES.
17th "	HON. JOHN DAVIS.
18th "	HON. CHAMBERS Y. PATTERSON.
26th "	HON. ROBERT N. LAMB.
28th "	HON. SAMUEL P. OYLER.

JUDGES

OF THE

COURTS OF COMMON PLEAS.

1st District,	HON. MORRIS S. JOHNSON.
2d "	HON. JAMES T. PIERCE.
3d "	HON. DAVID T. LAIRD.
4th "	HON. PATRICK H. JEWETT.
5th "	HON. SCOTT CARTER.
6th "	HON. JOHN F. KIBBY.
7th "	HON. FRANK EMERSON.
8th "	HON. THOMAS W. WOOLLEN.
9th "	HON. HENRY BURNS.
10th "	HON. JOHN T. SCOTT.
11th "	HON. WILLIAM R. WEST.
12th "	HON. SOLOMON BLAIR.
13th "	HON. JOSEPH RISTINE.
14th "	HON. WILLIAM GARVER.
15th "	HON. BERNARD SCHERMERHORN.
"	HON. ALFRED REED.*
16th "	HON. HIRAM A. GILLET.
17th "	HON. ELISHA EGBERT.
18th "	HON. JACOB M. HAYNES.
19th "	HON. WILLIAM M. CLAPP.
20th "	HON. DAVID STUDABAKER.
"	HON. ROBERT S. TAYLOR.†
21st "	HON. THOMAS C. WHITESIDES.
22d "	HON. WILLIAM A. CULLEN.
23d "	HON. JOHN M. LARUE.
24th "	HON. THOMAS J. CASON.

*Commissioned October 1st, 1869.

†Commissioned September 1st, 1869.

JUDGES
OF THE
CRIMINAL COURTS.

Marion,.....Hon. GEORGE H. CHAPMAN.

Tippecanoe,..... Hon. DAVID P. VINTON.

Allen,.....Hon. JAMES W. BORDEN.

Wayne,.....Hon. GEORGE HOLLAND.

Vigo,.....Hon. JOHN G. CRAIN.

Floyd and Clark, Hon. JOHN H. BUTLER.

“ “ “ Hon. MELVILLE C. HESTER.*

Vanderburg,.....Hon. ANDREW L. ROBINSON.

Jefferson,.....Hon. JEREMIAH SULLIVAN.

*Commissioned April 28th, 1870.

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OVERRULED, &c.

CASES
ARGUED AND DETERMINED
 IN THE
SUPREME COURT OF JUDICATURE
 OF THE
STATE OF INDIANA,
 AT INDIANAPOLIS, MAY TERM, 1869, IN THE FIFTY-THIRD YEAR
 OF THE STATE.

SIMPSON and Others v. PEARSON, Administrator.

PRACTION.—*Appeal from Interlocutory Order.*—In a suit by an administrator to subject real estate to sale for the payment of the debts of the decedent, an appeal to the Supreme Court from the interlocutory order of sale was taken, an appeal bond approved by the court being filed and the appeal prayed at the term at which the order was made.

Held, that the appeal was authorized by the code (section 576), and taken in accordance with its provisions (section 577).

HUSBAND AND WIFE.—*Conveyance.*—*Survivorship.*—Where real estate is conveyed in fee simple to a man and his wife, upon the death of the husband: he leaves no estate in such land subject to the payment of his debts, or that descends to his heirs; but the widow becomes seized of the whole estate to her sole use by virtue of her right of survivorship.

SAME.—*Estoppel.*—Where at the suit of a widow against the children and heirs at law of her husband for partition of land conveyed to the husband and wife jointly, in accordance with the prayer of the petition a moiety was set off to the widow in her own right and the other moiety was divided between the widow and children as land descended to them from the husband;

Held, in a suit by the administrator of the husband's estate to subject to sale for the payment of the decedent's debts the land so set apart to said chil-

31	1
194	890
31	1
135	183
135	682
31	1
139	177
31	1
149	371
31	1
157	454
31	1
160	532

Simpson and Others v. Pearson, Administrator.

dren and heirs at law, that the widow and heirs were not estopped by the proceedings in the partition suit from denying that the husband died seized in fee of a moiety of the land, or from asserting the truth in relation to the title.

APPEAL from the Floyd Common Pleas.

This was a petition by Pearson, as administrator *de bonis non* of the estate of Reuben Simpson, deceased, praying an order for the sale of certain lands in Lawrence county, Indiana, for the payment of the debts of the decedent. The petition, after showing the insufficiency of the decedent's personal estate for the payment of his debts, alleges, that after the death of said Reuben Simpson, his widow, Martha C. Simpson, filed a petition in the Lawrence Circuit Court, against the children and heirs of the decedent, for the partition of certain lands situate in said county, claiming that she was seized in fee, in her own right, of one undivided half of the lands described in the petition, and that her husband died seized in fee of the other moiety, one-third of which descended to her as his widow, and the remaining two-thirds to his children, and that she was therefore entitled to two-thirds of the whole in fee; and that such proceedings were thereupon had that partition was made according to the prayer of the petition; and the administrator now claims that the lands so partitioned and set apart to the children and heirs at law of the decedent be sold for the payment of his debts.

Martha C. Simpson, the widow of the decedent, answered in two paragraphs:

The first alleges, that on and prior to the 29th of February, 1856, she and the decedent were husband and wife, and that on the day named, one Barnabas Miller and his wife made, executed, and delivered to her and her said husband jointly, a deed of conveyance in fee simple to the lands described in the petition, with other lands, and that her said husband never held any other title, claim, or interest in the lands so conveyed than under said deed; that he subsequently died leaving her as his widow surviv-

ing him; and she claims that all the right, interest, and estate of her said husband in said lands ceased and were determined by his death; and that she, as his widow and surviving grantee under said deed, at his death became, and still is, the sole and exclusive owner in fee of the whole of said lands, and that no interest therein, whatever, descended from said Reuben to his children and heirs at law; and that ever since the death of her said husband she has held the whole of the lands as and for her own. Miller's deed is made a part of the answer and runs thus: "In consideration of the sum of six thousand dollars to Barnabas Miller paid by Reuben Simpson and Martha C. Simpson, his wife, the said Barnabas Miller doth convey and warrant to said Reuben Simpson and Martha C. Simpson, their heirs and assigns, the following tracts of land," &c.

The other defendants filed a joint answer, in two paragraphs. The first is the general denial. The second is substantially the same as the first paragraph of the answer of Martha C., with the additional averment that if any interest or right in the lands has been divested out of the said Martha C., since the death of said Reuben, it has vested in them by virtue of the proceedings of the Lawrence Circuit Court in the suit for partition referred to in the petition herein, and not by descent from said Reuben.

The court sustained demurrers to the first paragraph of the answer of Martha C. Simpson and to the second paragraph of the answer of the other defendants, to which proper exceptions were taken; and on final hearing the court made an order for the sale of the lands described in the petition, to make assets for the payment of the debts of the decedent. From this order the defendants appealed, and filed an appeal bond which was approved by the court.

ELLIOTT, C. J.—Before examining the questions raised by the assignment of errors, our attention is called to a preliminary one, raised by the appellee. The appeal being from an interlocutory order, and not from a final judgment, it is

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urged that it is prematurely brought, and should be dismissed.

Section 550 of the code authorizes appeals to this court from the circuit and common pleas courts from all final judgments, with certain exceptions; and section 576 provides, that "appeals to the Supreme Court may be taken from an interlocutory order of any court of common pleas, or circuit court, or judge thereof, in the following cases:

* * * * *

Second. For the delivery of possession of real property, or the sale thereof." Section 577 enacts, that "such appeal may be taken at the term of the court at which the order is made; or when made in vacation, the appeal may be taken at the time, or during the next term; the appeal shall not be granted until the appellant has filed an appeal bond, as in other cases of appeal." Here the appeal was taken during the term at which the order was made, and a bond was filed under the order of the court; and we think the provisions of the code referred to clearly authorize the appeal. This ruling is not in conflict with *Staley v. Dorset*, 11 Ind. 367; *Love v. Mikals*, 12 Ind. 439; or *Berry v. Berry*, 22 Ind. 275; but is entirely consistent with them. In neither of those cases was a bond filed and the appeal prayed at the term at which the order of sale was made, and in each of them it is stated that the appeal was not prayed and perfected under sections 576, 577 of the code.

The ruling of the court in sustaining the demurrers to the first paragraph of the answer of Martha C. Simpson, and to the second paragraph of the answer of the other defendants, presents the only questions urged by the appellants for a reversal of the order of the court appealed from.

Husband and wife are considered one person in law, and hence the deed from Miller to Reuben Simpson and his wife, Martha C., did not invest them of separate moieties of the land conveyed, but each thereby became seized of it as an entirety, with the right of survivorship; and upon the death of Reuben Simpson, his widow, Martha C., by virtue

of her right of survivorship, became seized of the whole estate to her sole use. *Davis v. Clark*, 26 Ind. 424. It follows that Reuben Simpson at his death left no estate in the land subject to the payment of his debts, or that descended to his heirs. That such is the legal effect of the deed is not controverted by the appellee; but it is insisted that the appellants are concluded, or estopped, by the proceedings in the suit for partition in the Lawrence Circuit Court, from denying that Reuben Simpson died seized in fee of a moiety of the lands which were the subject of that suit, and that such moiety, upon his death, descended to his widow and heirs at law; and therefore, that the court did right in sustaining the demurrers.

The acts and admissions of a party may estop him from even speaking the truth, when in good conscience and honest dealing he ought not to be permitted to gainsay them. An estoppel may be by deed, by record, or by matter *in pais*. As to the latter, a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, when such denial will operate to the injury of the latter. See *Ridgway v. Morrison*, 28 Ind. 201, and cases there cited. The principle underlying such estopples is, that it would be a fraud in a party to assert what his previous conduct and admissions have denied, when on the faith of that denial others have acted.

But one who insists upon the acts of another as working an estoppel must show that he acted upon the same, and was influenced thereby to do some act which would result in an injury if that other is permitted to gainsay or deny the truth of what he did. For it is a well settled rule in such cases, that no man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by such act or declaration. Washb. Real Prop. b. 3, ch. 2, § 6, 9, a.

It follows from the very principle on which the whole

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doctrine of estoppels rests, that they operate neither in favor of nor against strangers, but affect only the parties thereto and their privies, either in blood, in estate, or in law; and hence a stranger can neither take advantage of, nor be bound by, an estoppel. This principle applies equally to estopples by deed, by record, and *in pais*. It is a well settled rule, that judgments of courts are binding only on parties thereto and their privies. An estoppel must be mutual; and hence a stranger to the record cannot claim an estoppel thereby, as he is not himself estopped by it.

Mr. Washburn, speaking of estoppels by deed, says: "It should be remembered, that an estoppel by deed is always applied in some action or proceeding based on the deed, in which the fact in question is recited. In a collateral action there can be no estoppel, nor will estoppels by deed avail in favor of any but the parties and their privies." B. 3, ch. 2, § 6, 11.

Applying these rules to the case at bar, it seems evident that neither Martha C. Simpson nor the heirs at law are estopped by the proceedings in the partition suit from denying, in this case, that Reuben Simpson died seized in fee of a moiety of the land described in the petition for partition, or from asserting the truth in reference to the title thereto. The administrator stands in the relation of trustee to the creditors of the decedent; but neither the administrator nor the creditors of the decedent were parties to the suit for partition, nor do they, in any manner, occupy the relation of privies to the parties to that suit, and are not therefore in a position to claim that the parties thereto are estopped thereby from showing that the decedent left no interest or estate in the lands subject to the payment of his debts.

We think, therefore, that the court below erred in sustaining the demurrers.

The judgment is reversed, with costs, and the cause remanded, with directions to the Court of Common Pleas to

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overrule the demurrers to the first paragraph of the answer of Martha C. Simpson and to the second paragraph of the answer of the other defendants, and for further proceedings, not inconsistent with this opinion.

J. & T. L. Collins, for appellants.

J. H. Stotsenburg and T. M. Brown, for appellee.

GREEN, Treasurer of Fayette County, and Others v. BEESON and Others.

TURNPIKE.—*Act of 1865.*—*Length of Road.*—A turnpike company organized under the act of March 6th, 1865, must make at least five miles of road; and this requirement is not fulfilled by supplying a deficiency by the acquisition, by purchase or otherwise, of a road already made.

SAME.—*County Commissioners.*—The Board of County Commissioners cannot relieve the company from this requirement, and any attempt to do so is a nullity.

SAME.—*Injunction.*—If such a route is designated in its organization that less than five miles of road is to be made, the company has no power to do anything; and the collection of taxes for the construction of the road may be enjoined.

SAME.—*Estoppel.*—A signer of the petition to the County Commissioners for the organization of such a pretended corporation, who has not become a member of it, is not estopped from denying the legality of the organization in a suit to enjoin the collection of such taxes.

APPEAL from the Wayne Common Pleas.

This was a suit by the appellees against the appellants to enjoin the collection of taxes assessed against the plaintiffs for the construction of a turnpike under the act of March 6th, 1865.

The substantial averments of the complaint are set forth in the opinion.

The defendants answered in three paragraphs:

First, the general denial.

Second, that the Bentonville and Lockwood Turnpike

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Company is a body corporate, organized under the act of March 6th, 1865, and amendatory acts, by virtue of the power and authority granted by the Boards of Commissioners of Wayne and Fayette counties, to construct a road five miles in length; that the one mile of said road mentioned in the complaint as belonging to the Milton and Rushville Turnpike Company was released by the latter company and abandoned by its stockholders to the former company, and, by such release and abandonment and the permission and order of the Boards of Commissioners of Wayne and Fayette counties, became a part of the road of said Bentonville and Lockwood Turnpike Company; that this company proceeded to the construction of its road, for which said taxes were assessed, and had nearly completed it at the commencement of this suit.

Third, that certain of the plaintiffs were signers of the petition for permission to organize the company, and are therefore estopped from denying the legality of its organization.

A demurrer to the second and third paragraphs of the answer was sustained, and the defendants excepted.

The issue made by the general denial was tried by the court, and the injunction made perpetual except as to the plaintiffs John Ingles and Christian Pike, as to whom it was dissolved.

A motion for a new trial was made by the defendants, and also by the plaintiffs John Ingles and Christian Pike, and overruled; and bills of exceptions were filed.

FRAZER, J.—The question first to be disposed of in this case is as to the sufficiency of the complaint. The substantial allegations of it were as follows:

That the plaintiffs respectively own lands within three-fourths of a mile on either side of a turnpike, located partly in Fayette and partly in Wayne county, which is being constructed by a pretended corporation attempted to be organized under the act of March 6th, 1865, for the con-

struction of gravel and turnpike roads; that the turnpike to be constructed by the supposed corporation is only four miles long, and within its necessary length of five miles embraces one mile of turnpike already constructed and belonging to another corporation; that taxes were levied upon the said lands of the plaintiffs for the construction of said four miles of road. The relief sought was an injunction to restrain the collection of such taxes.

Such a lapping of one turnpike upon another, to obtain the distance of five miles, was an attempt to evade rather than satisfy the eighth section of the act requiring that no road made in pursuance thereof shall be less than five miles in length. Acts 1865, p. 92. If it might be done for a distance of one mile, it might be for any distance. It is altogether and expressly forbidden by the letter and spirit of the statute.

But it is urged, that the boards of commissioners having permitted the organization of the turnpike company, the matter is not longer open to inquiry. This position is untenable. The commissioners were in the exercise of a special statutory power; they must execute that power as it is given; they cannot exercise it in disregard of the statute which confers it, and especially where that statute expressly forbids them to do so; and any attempt of the kind is merely a nullity, binding nobody. A judicial proceeding where parties have a right and opportunity to be heard is very different; and in such a case a judgment which the tribunal has jurisdiction to render will bind, though it be erroneous. But in the case before us, as stated in the complaint, the commissioners had no jurisdiction to authorize the corporation. The proceeding before them was *ex parte*; nobody was required to be notified. It would be monstrous if action had under such circumstances should be held to conclude further inquiry.

But it will be observed that the statute under which the commissioners acted expressly authorizes them to determine only one question, to wit: whether the proposed work

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will be of public utility, the antecedent requirements of the first section of the act being strictly jurisdictional and necessary to put the tribunal in motion; and the statute does not, in terms, even require the board to ascertain whether these jurisdictional facts are true, though they must undoubtedly be stated in the petition, and probably it was the duty of the boards to have ascertained their truth before proceeding further; and it may be that their decision on that subject would be conclusive when questioned collaterally. *The Evansville, &c. R. R. Co. v. Evansville*, 15 Ind. 395. But that the length of the road proposed to be constructed shall be five miles, is not a matter to be decided before authority shall be given to form the corporation. A petition by the owners of three-fifths of the real estate lying within three-fourths of a mile on each side of the proposed turnpike, stating its location and length and their desire to construct it, is all that is required to evoke the action of the tribunal. Whether or not so much of the proposed route is already occupied by a turnpike completed that five miles does not remain to be constructed, is not then an inquiry. But after the corporation is created, a restraint is imposed upon its action by the eighth section of the act. It cannot *make* less than five miles of road, and it must commence its work within two years and finish it within six years. If such a route is designated in its organization that there are only four miles to make, then it has no power to do anything; for it would be idle to say that it might collect money which it could not lawfully expend. And it is equally idle to say that the purchase or other acquisition of a road already made answers the requirement of the statute.

So we are of opinion that the court below was correct in not carrying back and sustaining to the complaint the demurrer to the second and third paragraphs of the answer. What has already been said determines also that those paragraphs of the answer were bad, and that the demurrer to them was correctly sustained.

We are unable to perceive why the signing of the peti-

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tion to the commissioners should constitute an estoppel in this case. Indeed, the argument for the appellants concedes as much. If the corporation cannot lawfully expend money under its peculiar organization, what equity can there be in allowing it to collect money?

The finding against the defendants was well sustained by the evidence.

But we cannot sustain the finding against the plaintiffs John Ingels and Christian Pike. The case made by them was the same as that made by the other plaintiffs, except that they were petitioners for the organization of the turnpike company. It does not appear that they became members of it. Their motion for a new trial should have been granted.

Judgment against the defendants below affirmed, with costs; that against the plaintiffs John Ingels and Christian Pike reversed, with costs, and cause remanded for new trial as to them.

B. F. Claypool and J. S. Reid, for appellants.

J. B. & J. F. Julian, for appellees.

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MOOR v. SEATON.

NEW TRIAL.—As of Right.—The form of the issues in an action to quiet title to real property cannot abridge the right of the losing party to have a new trial on the payment of costs as provided by section 601 of the code.

SAME.—In a suit to quiet title to real property, there was a finding for the defendant upon a cross complaint.

Held, that the plaintiff was entitled to a new trial on the payment of costs.

REPEAL OF LAWS.—Inchoate Rights.—Inchoate rights generally, derived from a statute, are lost by its repeal, unless saved by express words in the repealing statute.

SAME.—Redemption.—School Lands.—A purchaser of school lands having made default in the payment of interest on purchase money, the lands were re-

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sold. By the law in force at the time of his purchase, a defaulting purchaser had a right to redeem within one year after sale; by that in force at the time of the sale, and at the time of the default, a delinquent purchaser could redeem at any time before sale, but not after.

Held, that the right to redeem was governed by the latter law.

APPEAL from the Pulaski Circuit Court.

GREGORY, J.—Suit by Seaton against Moor, to quiet title to real property.

The defendant answered, first, by the general denial; second, by way of cross complaint, that he was the owner in fee of the land, and that the plaintiff claimed some interest therein adverse to his; but that the claim was groundless; prayer, to quiet the defendant's title. Reply, the general denial.

A trial resulted in a finding for the defendant. The plaintiff obtained a new trial by the payment of the costs.

This is the first alleged error complained of. It is claimed, that as the finding was on the cross complaint, the plaintiff was not entitled to a new trial as a matter of right.

The statute secures to the losing party a new trial on the payment of costs. 2 G. & H. pp. 283, 284, secs. 601, 612. The form of the issues cannot abridge this right.

The land in controversy is school land, being a part of section sixteen. The appellant purchased the land in November, 1854. He paid a portion of the purchase money, and was to pay interest on the residuc. The interest was paid until 1860, when default was made and continued to be made until the land was sold in March, 1864, to the appellee.

By the law in force at the time of the purchase the defaulting purchaser had a right to redeem at any time within one year after the sale. 1 R. S. 1852, pp. 451, 452, secs. 100, 105. By the law in force at the time of the sale, and at the time of the default, the delinquent purchaser could redeem at any time before sale, but not after. Moor offered to redeem after the sale and within the year.

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The question is, which law must govern? In *Patterson v. Cox*, 25 Ind. 261, it was held, that the right of a mortgagor, or his assigns, to redeem land sold at a sinking fund sale is governed by the law in force at the time of the sale.

This principle follows the plain and obvious one, that inchoate rights generally, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute. *Butler v. Palmer*, 1 Hill, 324.

Moor was in default; he had no standing in court except such as was given him by the statute. The case at bar cannot be distinguished from that of *Patterson v. Cox*, *supra*.

There are objections made to the form of the proceedings connected with, and forming a part of, the sale. Upon examination it is found that these proceedings were according to the statute in force at the time of the sale.

The judgment is affirmed, with costs.

D. P. Baldwin, for appellant.

J. B. Belford, for appellee.

 SIEVEKING and Another v. LITZLER.

SALE.—Rescission.—Suit by the buyer to rescind an executed contract for the sale of one-half of a portable mill.

Held, that an averment that the seller never intended that the buyer should derive any benefit from the mill, or exercise any control over it, could add no force to the complaint.

Held, also, that the fact that after the sale was completed the buyer was not permitted to collect money or examine the books, could not entitle him to rescind the contract.

SAME.—Misrepresentation.—Value.—A misrepresentation by the seller as to the value of the article offered for sale is not available to rescind the contract; but where a fact is stated falsely which goes to make up the value (as the number of feet of lumber a portable saw-mill can saw in a day), and which is peculiarly within the knowledge of the seller, upon the seller's

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statement of which the buyer can rely without negligence, the false statement may constitute a ground for rescission.

SAME.—If the buyer relies upon a statement of the seller that the former will make a good and profitable trade by the purchase, it is the buyer's own folly.

SAME.—*Promise.*—The failure of the seller to keep a mere promise, to be performed after the sale is complete, is not a ground for rescission.

SAME.—*Fraud.*—*Diligence.*—The party claiming to rescind a contract of sale on account of fraud must act at once upon discovery of the fraud; and he cannot postpone discovery by neglect to use ordinary diligence. This rule must be strictly enforced where the law affords a complete remedy in damages.

SAME.—*Injury.*—To authorize a rescission of a contract of sale on the ground of fraud, there must be an injury shown as the result of that fraud.

APPEAL from the Vanderburg Common Pleas.

RAY, J.—This was an action to rescind a contract for the purchase by the appellee of one-half interest in a portable saw-mill.

A demurrer was filed to the amended complaint, which was overruled; and this is presented as error in this court. As the appellee denies the accuracy of the abstract filed by the appellant, we have used the one furnished by himself.

The complaint charges, that the appellant, Sieveking, wilfully contriving and intending to cheat and defraud the appellee out of his tract of land, hired one John Wall, a sawyer, at the price of one hundred dollars, to assist him in the perpetration of the fraud; that, in pursuance of his fraudulent design, on the 14th of March, 1867, he and the said Wall, the sawyer, by misrepresentation, falsehood, and fraud, succeeded in putting upon the appellee the one-half of a portable saw-mill and two log-wagons, at a price of \$2,225; that Sieveking received in payment from the appellee, two promissory notes, one for \$725, secured by mortgage on the one-half of the saw-mill and two log-wagons, and the other for \$1,500, secured by mortgage on the appellee's tract of land. It is averred that the appellee was ignorant of the value, capacities, and uses of saw-mills and machinery; that he was ignorant of business and the manner of transacting the same; that he was weak of intellect and

mind; that Sieveking, well knowing the appellee's ignorance in such matters, and his weakness of intellect, assisted by said Wall, the sawyer, falsely and fraudulently represented to the appellee that said mill could cut on an average eight thousand feet of lumber per day; that Wall, the sawyer, could and would go with and attend said mill; that Sieveking then had contracts at Poseyville, Indiana, for the cutting of one million feet of lumber, and that he had contracts at Blairsville, Indiana, for the cutting of another million feet; that boarding could be had at both Poseyville and Blairsville for three dollars per week; that Sieveking could and would, within two weeks, bring the mill out to the points at which he had the contracts for cutting the lumber; that one-half the saw-mill was well worth twenty-five hundred dollars; that the appellee would make a good and profitable trade by buying one-half of the saw-mill, the log-wagons, and the contracts. It is averred, that the appellee, confiding in the truth of the representations of Sieveking and Wall, was induced to make the purchase, and to execute the said notes and mortgages; that each and every one of said representations was false, in this, that the said mill could not cut on an average eight thousand feet of lumber per day; on the contrary, it could only cut about four thousand feet per day; that the said Sieveking had no contracts, whatever, for cutting lumber at Poseyville, Indiana; that he did not have contracts at Blairsville for the cutting of one million feet; on the contrary, his contracts were for eighty thousand feet only; that Wall did not go with or attend the mill, but was prevented from so doing by Sieveking; that boarding could not be had at either Poseyville or Blairsville for three dollars per week, or for less than four dollars; that Sieveking did not bring the mill out until two months had expired; that one-half the mill was not worth twenty-five hundred dollars, nor was the entire mill and two log-wagons worth exceeding three thousand dollars. It is averred, that Sieveking never intended that the appellee should derive any benefit from, or exercise any control over, the mill; that he

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would not, after the mill had been brought out, permit the appellee to examine any of the books, contracts, or accounts, nor would he allow the appellee to collect or receive any of the money arising from the operations of the mill; that he forbade the sawyer and the employees from making any communications whatever to the appellee concerning the mill and business; that Sieveking had the full and exclusive control of the mill and two log-wagons from the date of the sale and purchase up to the time of bringing the suit; and that he had received and appropriated all the moneys arising from the mill and business, excepting five dollars which the appellee collected and paid to one of the employees of the mill. It is alleged, that the appellee, as soon as he had fully discovered the fraud which had been practiced upon him, to wit, in July, 1867, tendered the five dollars to the appellant Sieveking, and offered to rescind the contract *in toto*, and demanded the cancellation of the notes and mortgages, but that Sieveking refused. It is also averred, that the defendant Schellhaus had some kind of a claim to the mortgage on the tract of land, claiming under an assignment from Sieveking. Issues were made, a jury was waived, and a trial was had before the court.

There are many averments which cannot be regarded as adding any force to the complaint for rescission. Thus, it is alleged, "that Sieveking never intended that the appellee should derive any benefit from, or exercise any control over, the mill." In the case of *Hemingway v. Hamilton*, 4 M. & W. 115, Lord ABINGER said: "Suppose a man contracts in writing to sell goods at a certain price, and afterwards delivers them, could the buyer plead that at the time of the contract the seller fraudulently intended not to deliver them, but to dispose of them otherwise?" If the sale was completed, the purchaser could not be prevented from deriving profit and exercising control over the mill by an intention existing in the mind of the seller at the time of the contract. There is no averment that the appellee was actually prevented by Sieveking from exercising the

control of the mill to which his purchase of a half interest entitled him.

The fact that after the purchase was completed the appellee was not permitted to collect money or examine the books, may have furnished ground for the dissolution of the partnership or the aid of a court in exercising his rights, but could not entitle him to go back and rescind an executed contract. So, also, as to the averment of the value of the mill. This is but matter of opinion, and not available for the purpose of rescission. Where facts peculiarly within the knowledge of the seller, upon which the purchaser may rely without the charge of negligence, are stated falsely, which go to make up the value, there, they may constitute a ground for rescission; as in the case of *Shaeffer v. Sleade*, 7 Blackf. 178, where suit was brought upon a mortgage given for part of the purchase money for certain figures representing the signers of the Declaration of Independence. In that case, although the judgment allowed simply for a partial failure of consideration, yet the court did not regard the statement of value as material, but stated the question to be, "whether there were such false and fraudulent representations as to the durability of the figures, and as to the profits derived from their exhibition, as to impose upon the purchaser and induce him to make the contract set out in the bill." See, also, *Sandford v. Handy*, 23 Wend. 260; *Foley v. Cowgill*, 5 Blackf. 18.

Those were facts going to make up the value, and if falsely stated afforded ground of relief, as, in this case, the capacity of the mill to saw eight thousand feet of lumber per day is material in fixing the value of the mill.

The statement by Sieveking, that appellee would make a good and profitable trade by the purchase, is a mere expression of opinion, "and if any one relies on mere opinion, instead of ascertaining facts, it is his own folly." 2 Par. Con. 778.

There are also averments in the complaint which amount

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to simple promises; as, that Sieveking could and would within two weeks bring the mill out to the points at which he had the contracts for cutting the lumber. The complaint does not deny that Sieveking could do this, but complains that he failed to keep the promise to be performed two weeks after the sale was complete. It is also alleged, that he failed to bring the mill out for two months; but if this had been a ground for rescission, it should have been acted upon. The appellee would have waived this delay by not rescinding at once for that reason. He remained the joint owner for at least two months after this delay. In *Hunt v. Silk*, 5 East. 449, it is said: "If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelve month on the same account? This objection cannot be gotten rid of; the parties cannot be put in *statu quo*;" and in *Campbell v. Fleming*, 1 A. & E. 40, it was held, that if a party be induced to purchase an article by fraudulent representations, and after discovering the fraud continue to deal with it as his own, he cannot recover back the money from the seller; and, *semble*, that the right to repudiate the contract is not afterwards revived by the discovery of another incident in the same fraud.

The allegation that the mill was represented to cut eight thousand feet of lumber per day, when in fact it would only cut four thousand, is material; and the only question is, has the appellee used proper diligence in discovering this fact? As a joint owner, was he authorized to go forward for four months at least without informing himself as to the ability of the mill? One of the most clearly established rules in this class of cases is, that the party claiming to rescind on account of fraud must act at once on discovery of the fraud; and he cannot postpone discovery by neglect to use ordinary diligence. This rule should be strictly enforced where, as in this case, the law affords a complete remedy in damages, and he can make the defense of partial failure of

consideration when suit is brought on the notes. No excuse is offered for the delay. He does not deny that he could immediately have satisfied himself of the capacity of the mill; and if he failed to do so, he is chargeable with knowledge. The question of time must be determined by each contract, but in all cases there must be reasonable care, and if upon the exercise of such care the fraud would appear, the party must be held to prompt action. We think the complaint should have excused the want of discovery of this fraud at an earlier date, under the circumstances of this case.

There remain the averments, that Sieveking represented that he had contracts at Poseyville for the cutting of one million feet of lumber, and at Blairsville for another million feet, and that board was only three dollars per week. It is averred, that there was no contract at Poseyville, and at Blairsville a contract only for eighty thousand feet of lumber. But there is no averment that the mill has not been constantly employed on contracts of equal value, or that the appellee has ever suffered any damage from the failure to fill such contracts. To authorize a rescission on the ground of fraud, there must be an injury shown as the result of that fraud. It would seem almost out of place to cite authority to sustain so plain a proposition of law, but the averments in this complaint having been held sufficient by the court below, we refer to a text book, 2 Par. Con. 772. See, also, *Fuller v. Hodgdon*, 25 Maine, 243.

The demurrer should have been sustained to the complaint.

On the trial, resulting in a finding for appellee, there was a failure to prove the averment of the representation having been made, that the mill would saw eight thousand feet of lumber per day—in fact, an entire failure by the appellee to make any case for rescission.

Judgment accordingly reversed, with costs, and the court below directed to sustain a demurrer to the amended complaint.

C. Denby and P. Maier, for appellants.

J. M. Shackelford, for appellee.

The Adams Express Company v. Darnell.

THE ADAMS EXPRESS COMPANY v. DARNELL.

PLEADING.—General Denial.—The answer of general denial, under the code, merely puts in issue such of the averments of the complaint as the plaintiff is bound to prove in order to maintain his action; it does not controvert redundant allegations.

COMMON CARRIER.—Express Company.—Delivery.—An express carrier's duty to deliver to the consignee in person and the consignee's duty to receive are reciprocal. The consignee cannot, by design, or to promote his convenience, take away the right of the carrier to terminate, by delivery, the liability as insurer within a reasonable time.

SAME.—Absence of Consignee.—Where the consignee has notice of the arrival, and the carrier is ready to deliver, but is prevented by the consignee's absence, required by his interests, convenience, or pleasure, then the liability as carrier ends, and thenceforward the liability is for such reasonable care of the property as prudence requires.

SAME.—Suit against an express company, to recover the value of a package of U. S. bonds entrusted by plaintiff to defendant, to be carried from I. to W., consigned to plaintiff, lost by the negligence of defendant, and not delivered to plaintiff. Answer, that defendant kept an agent and office at W., and plaintiff resided there; that W. was a small village to which valuable packages were seldom sent, the express business of defendant at that point being so small as not to require or justify defendant to keep an iron safe, and none was kept there by defendant; of all which plaintiff had notice; that when the package was delivered by plaintiff to defendant at I., the former well knew that by due course of transmission it would arrive at W. at noon on a certain day, at which hour it did arrive safe, and was ready for delivery to plaintiff, who was absent from home during all that day and had no agent there, so that delivery to him in person could not be made on that day during business hours, though defendant was then ready to make such delivery; that defendant afterwards, on that day, deposited said package in a good and secure iron safe of one H., reputed to be a respectable and responsible merchant of the village, and caused the safe to be securely locked, said safe being the most secure place of deposit in the village; that on that night the safe was robbed by burglars, and the bonds stolen, wherefore it became impossible to deliver.

Held, that the answer showed that the liability of the defendant as carrier had ended when the package was lost, and that the defendant exercised reasonable care as bailee after the termination of such liability.

APPEAL from the Marion Common Pleas.

FRAZER, J.—This was a suit against the appellant as an

express carrier, by the appellee, to recover the value of U. S. bonds to the amount of \$21,000, entrusted by the appellee to the express company, to be conveyed from Indianapolis to the village of Waldron, consigned to the appellee, and lost by the negligence of the appellant, and not delivered to the plaintiff.

There was an answer in five paragraphs, only two of which need be noticed.

1. General denial.

2. That the defendant kept an agent and office at Waldron, and plaintiff resided there; that W. was a small village to which valuable packages were seldom sent, the express business of the defendant at that point being so small as not to require or justify the defendant in keeping an iron safe, and none was therefore kept there by it; of all which the plaintiff had notice; that when the package was delivered by the plaintiff to the defendant at Indianapolis the former well knew that by due course of transmission it would arrive at Waldron at noon on the 11th of May, 1866, at which hour it did safely arrive and was ready for delivery to the plaintiff; that the plaintiff was absent from home during all that day, and had no agent there, so that delivery to him in person could not be made on that day during business hours, though the defendant was then ready to make such delivery; that the defendant afterwards, on that day, deposited said package in a good and secure iron safe of one Haywood, reputed to be a respectable and responsible merchant of the village, and caused the safe to be securely locked, said safe being the most secure place of deposit in the village; that on that night the safe was robbed by burglars and the bonds stolen, wherefore it became impossible to deliver.

It is assigned for error, that a demurrer was sustained to the second paragraph of the answer.

If the facts alleged in the second paragraph of the answer are true, and are sufficient to show proper care, then it is not true, as the complaint avers, that the bonds were lost

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by the defendant's negligence, and to that extent the general denial was equally effective.

The liability of a common carrier, however, is that of an insurer. If the complaint be regarded as making a case against the defendant in that character, and if the facts averred in the second paragraph of the answer show that all the defendant's duties as carrier had been performed, and its liabilities as such ended, when the package was lost, and that the responsibility of the defendant was, at the time of the loss, merely that of bailee, or warehouseman, or anything less than that of carrier, then the paragraph confesses and avoids; it admits the receipt of the property as carrier and the failure to deliver, as alleged, which was all that the plaintiff need prove to make a case, but it attempts to avoid the consequent liability by showing a certain state of facts. Are these facts sufficient in avoidance? If they are, the paragraph was good; if not, it was bad.

The scope of the general denial, under the code, is merely to put in issue such of the averments of the complaint as the plaintiff is bound to prove in order to maintain his action; it does not controvert redundant allegations. *Baker v. Kistler*, 13 Ind. 63.

Personal delivery of the package was one of the duties of the carrier as such. The answer shows that this was rendered impossible by the plaintiff, in consequence of his absence, with a knowledge by him of the arrival of the package. Could he thus knowingly and on purpose prolong the extraordinary liability of the defendant as insurer, by putting it out of the power of the latter to terminate that liability? It was the interest of the carrier to terminate its liability as insurer as soon as possible, and it was its right and duty to do so within a reasonable time, by delivery. Such was the nature of the contract. This right to terminate liability as insurer it was not in Darnell's power to take away, by design, or to promote his convenience; for to do so would be to secure to himself an additional insurance not contracted for. If his interests, convenience, or

pleasure, required his absence, the consequences of such absence should fall upon himself, and not upon another. Such absence, preventing delivery, would not discharge the defendant from all responsibility, but it would end its liability as carrier; thenceforth its liability would be that of a bailee, not liable as insurer, but for such reasonable care of the property as prudence would require; and the paragraph of the answer under consideration certainly shows such care.

The doctrine that the carrier's duty to deliver and the consignee's duty to receive are reciprocal, and that each must be maintained, is approved by the plainest considerations of justice, and is necessary to prevent wrong and imposition. We are not aware that it has ever been questioned. It has, on the contrary, been recognized by many decisions, but in none that we are advised of has it been so plainly declared as in *Roth v. The Buffalo, &c., R. R. Co.*, 34 N. Y. 548. See, also, *Marshall v. American Express Co.*, 7 Wis. 1; *Richardson v. Goddard*, 23 How. U. S. 28.

It may not be possible always to fix the exact time when the carrier's responsibility as insurer ceases, and when he becomes a mere bailee in deposit or otherwise. But where, as is alleged here, the consignee has notice of the arrival, and the carrier is ready to deliver, it seems to accord with reason as well as authority that then the liability as carrier ends. 34 N. Y., *supra*; *Young v. Smith*, 3 Dana, 91.

It is urged, however, that the appellant had, upon the trial, the full benefit of all the facts alleged in the second paragraph of the answer. But this is a mistake. Most of the facts alleged were in evidence, it is true, and properly so under other issues; but the court instructed the jury, that "if the plaintiff, to whom the package was consigned, was at the place where the package was to be delivered, the next day after its arrival, and ready to receive the same, it was within a reasonable time." This instruction would effectually deprive the appellant of the benefit of the facts.

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It told the jury very plainly that those facts did not relieve the carrier of responsibility as insurer. If the facts as pleaded were sufficient, then the instruction was obviously wrong.

A demurrer to the fourth paragraph of the reply was overruled, and this is assigned for error. This paragraph was addressed to the third paragraph of the answer, and is a good argumentative denial thereof, and therefore there was no error in overruling the demurrer to it. It contains other matters which have no application whatever to the defense to which it purports to be a reply, but seems to have been rather intended to apply to the second paragraph of the answer, to which, as we have seen, a demurrer had been sustained. It would have relieved the record of some confusion and redundancy if this paragraph of the reply had been stricken out. It did nobody any good, and has served to impair the pertinency of argument here.

Reversed, and remanded, with directions to overrule the demurrer to the second paragraph of the answer, and to allow both parties to amend their pleadings.

Gregory, J., dissents as to the sufficiency of the defense as stated in the second paragraph of the answer, and deems the sixth instruction correct.

T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellant.

M. M. Ray, J. W. Gordon, W. March, and B. F. Davis, for appellee.

McALISTER and Others v. BUTTERFIELD and Others.

WILL.—Mistake.—Evidence.—Parol evidence, or evidence *dehors* the will, is not admissible to correct an alleged mistake of a testator which is not apparent upon the face of the will.

SAME.—A testator, having devised certain real estate to his widow for her life and directed that at her death it should be sold and the proceeds divided equally between his heirs, and bequeathed his personal estate to be equally divided between his lawful heirs, directed that the remainder of his real estate be sold and the proceeds "equally divided between my lawful heirs, after deducting the amounts that the following named heirs have received: * * * My daughter F. has received \$2,100; J. has received \$1,600. I want my heirs to be made equal, and the remainder of my estate to be equally divided between my heirs."

Complaint by F. and J. against the widow, the other heirs and devisees, and the executor, alleging, that the testator recited and charged said sums against the plaintiffs erroneously, through mistake and inadvertence; that, in truth, F. had received only \$300, and J. had received no advancement whatever. Prayer, that the mistake be corrected, and that, in making distribution under the will, the advancement charged to J. be excluded, and that charged to F. reduced to \$300.

Held, that the matter sought to be contradicted was not simply the recital of a fact (although if merely such the plaintiffs would, it seemed, have been estopped from denying the truth of the recital), but also a limitation upon the interest of the plaintiffs in the estate devised.

Held, also, that evidence *dehors* the will was not admissible to prove the alleged mistake.

Held, therefore, that the complaint was bad on demurrer.

APPEAL from the Morgan Common Pleas.

Suit by Freelove McAlister and her husband, James McAlister, Joanna Breedlove and her husband, Thomas J. Breedlove, said Freelove and Joanna being daughters of John Butterfield, Sen., deceased, against John N. Gregory, executor of the last will of said decedent, and the other heirs and devisees of said John Butterfield, Sen.

The complaint alleges, that the decedent died, testate, seized and possessed of real and personal estate of the probable value of twenty-five thousand dollars, and leaving surviving him the defendant, Amanda Butterfield, (his widow) and the plaintiffs and other defendants (except John N. Greg-

31	25
194	41
31	25
140	402
31	25
147	68

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ory who is the executor of his will), his children and heirs at law; that by his will the deceased devised a portion of his property to his widow, and directed his executor to sell the residue and divide the proceeds thereof equally among his children; that in a recital of said will, wherein the deceased attempted to recite sundry advancements made to his children, he, through mistake and inadvertence, erroneously recited and charged against the plaintiff Freelope twenty-one hundred dollars, when in truth and fact he had advanced to her the sum of only three hundred dollars, and against the plaintiff Joanna sixteen hundred dollars, when in truth he had made to her no advancement whatever; that said executor had sold and converted the estate into money, and then had in his hands the sum of twenty-five thousand dollars for distribution, and was about to settle the estate and pay the legacies in accordance with the terms of said will, thereby deducting from the plaintiff Freelope's share twenty-one hundred dollars, and from the plaintiff Joanna's share sixteen hundred dollars, so charged against them by mistake. Prayer, that the mistake in the will be corrected, and that Freelope be charged with an advancement of only three hundred dollars, and Joanna with no advancement whatever.

The will is made an exhibit.

The first clause devises certain real estate, being the homestead, to Amanda, the widow, during her natural life; and by the third clause, the land devised to her for life is directed to be sold at her death, by the executor, and the proceeds of the sale equally divided between the heirs of the decedent, after paying the costs of the sale.

The fourth clause charges the personal estate with the payment of all the testator's debts and necessary expenditures, and directs that the residue be equally divided between his lawful heirs.

The fifth clause is as follows:

"5th. It is my further will that the remainder of my real estate be divided into four equal parts, according to the lines

by which it is now divided, and said lots of land be sold at public auction, to the highest bidder, and on such terms as my executor or administrator thinks best, and that the proceeds of said sale be equally divided between my lawful heirs, after deducting the amounts that the following named heirs have received: My son Velorus has received three hundred dollars; my son Meraum has received three hundred and seventy-five dollars; Luke G. has received three hundred dollars; Seymore A. has received three hundred dollars, also two hundred dollars, the balance due me on ten acres of land which I sold him for four hundred dollars, in the year 1858, making in all five hundred dollars; my daughter Freelove has received twenty-one hundred dollars; Joanna has received sixteen hundred dollars. I want my heirs to be made equal, and the remainder of my estate to be equally divided between my heirs."

The court sustained a demurrer to the complaint, on the ground that the facts alleged do not constitute a cause of action, and rendered final judgment for the defendants. The plaintiffs excepted, and appeal to this court.

ELLIOTT, C. J.—The error assigned is, that the court erred in sustaining the demurrer to the complaint.

The question presented in the case arises on the fifth clause of the will, in which the testator charges his daughter Freelove with twenty-one hundred dollars, and his daughter Joanna with sixteen hundred dollars, as having been received by them from him prior to the execution of the will. It is alleged in the complaint, that Freelove had only received the sum of three hundred dollars, and that Joanna had received no advancement whatever. The object of the complaint is to reform the will, by correcting the alleged mistake, and to thereby exclude the advancement charged to Joanna, entirely, and reduce that charged to Freelove to three hundred dollars, in making the distribution under the will.

The alleged mistake is not apparent on the face of the

McAlister and Others v. Butterfield and Others.

will, nor is there anything obscure or ambiguous in its language in reference to the several amounts so advanced; on the contrary, it is clear and positive. Hence the mistake, if any, must be proved by parol and extrinsic evidence, *dehors* the will; which is clearly inadmissible.

In the case of *Mann v. Mann's Executors*, 1 Johns. Ch. 281, Chancellor KENT, in delivering the opinion, said: "It is a well settled rule, that seems not to stand in need of much proof or illustration, for it runs through all the books from *Cheyney's Case* down to this day, that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specified cases: 1. Where there is a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described; and, 2. To rebut a resulting trust. All the cases profess to proceed on one or the other of those grounds."

The whole question is quite fully discussed in the 10th chapter of Redfield on Wills (p. 498), in which many of the adjudicated cases, both English and American, are referred to, and the rule is stated thus: "It seems perfectly agreed, that parol evidence is not admissible, to supply any omission or defect in a will, which may have occurred through mistake or inadvertence." See, also, 2 Phillipps Ev. 637.

The case of *Jackson v. Payne's Executors*, 2 Met. Ky. 567, was very similar to the case at bar, and involved precisely the same question. There the residuary clause of the will was as follows: "It shall be equally divided between my son Remus, and my daughters Eliza Estill, Anna Jackson, and Lydia Taylor, subject to the limitations, conditions, and trusts hereinafter provided." The will contained this further clause: "I have made advances to those four children, which advances I deem about equal." Jackson purchased a tract of land, at a sale thereof by the executors of the testator, and, when sued for an instalment of the purchase money, set up in his answer, that the testator by

his will "contemplated and intended an equal distribution of his estate among all his children, but through inadvertence and mistake in estimates of amounts advanced, his will, if literally carried out, would leave defendant's wife, Anna, who is one of the testator's children, with less than any of his other children to the amount of at least seven thousand five hundred dollars." Other facts were alleged to show how the error had occurred, &c. It was held, that the express terms of the will could not be contradicted or explained by parol testimony, and that a court of equity had no power to alter or modify it. In discussing the question it is said, in the opinion of the court, that "the general rule is, that parol evidence of the intention of a testator is inadmissible for the purpose of explaining, contradicting, or adding to the contents of a will; but that its language must be interpreted according to its proper signification, or with as near an approach thereto as the body of the instrument, and the state of the circumstances existing at the time of its execution, will admit of. The doctrine is, that courts of equity have jurisdiction to correct mistakes when they are apparent upon the face of the will, but the mistake must be apparent on the face of the will, or must be one that may be made out by a proper construction of its terms, otherwise there can be no relief. Parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity." See, also, *Brown v. Thorndike*, 15 Pick. 388; *Bond's Appeal*, 31 Conn. 183; *Hiscocks v. Hiscocks*, 5 M. & W. 362; *Newburgh v. Newburgh*, 5 Madd. 364; *Miller v. Travers*, 8 Bing. 244; *Walston's Lessee v. White*, 5 Md. 297; *Judy v. Williams*, 2 Ind. 449.

But it is claimed, that the statement in the will, of the amounts received by the appellants, can only be regarded as the recital of a fact, and that such a recital is only *prima facie* evidence of the fact recited, and may be disproved by evidence *aliunde*. If the charge in the will of advancements to the appellants were merely the recital of a fact, as

it is claimed, still, as the appellants claim under the will, they would, it seems, be estopped from denying the truth of the recital.

In *Denn v. Cornell*, 3 Johns. Cas. 174, the will of the testator contained the following clause: "And whereas I have conveyed to my son Cadwallader my lands in Coldenham, and to my son David, my lands in the township of Flushing, I give and devise all my remaining lands to my sons Cadwallader and David, and to my daughter," &c. It was held by Chancellor KENT, that the heir of the testator was estopped to deny that the premises referred to in the recital were conveyed to David; that it was an act of the ancestor to whom the heir was a privy, and he was therefore estopped to deny its truth. See, also, Washb. Real Prop. b. 3. ch. 2, § 6, 29.

But here the matter sought to be contradicted cannot be regarded simply as the recital of an independent fact. It is more; it charges the appellants with certain sums received by them from the testator, and thereby limits the interest in the estate devised to them, and lessens the amount that would otherwise have been given to and received by them on distribution. It is a limitation upon the interest of the appellants in the estate devised.

This they seek to remove by evidence *dehors* the will, to thereby increase their interest in the estate devised. Such evidence would be a clear violation of the rules already stated.

In argument, much stress is placed on the concluding words of the clause, viz: "I want my heirs to be made equal, and the remainder of my estate to be equally divided between my heirs." Construing the whole clause together, it is clear that it was the intention of the testator that, in the distribution of his estate, the advancements charged should be taken into the account, and the fund arising from the sale of the lands should be so distributed as, when taken in connection with the amounts charged as having been advanced to a part of the heirs, would make them all

equal. A preceding part of the clause, after providing for the sale of the lands, directs that the "proceeds of said sale be equally divided between my lawful heirs, after deducting the amount that the following named heirs have received." This language, if literally construed, would not make the heirs equal, which was the evident intention of the testator, but the language used did not clearly express that intention; and hence the concluding words, which were, doubtless, intended to explain what was meant by the words previously used, "after deducting the amount that the following named heirs have received;" and such is clearly the effect of the concluding words of the clause.

The court did right in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

C. F. McNutt and *A. Ennis*, for appellants.

S. Claypool and *F. P. A. Phelps*, for appellees.

31	41
129	219
31	31
153	406

MATHEWS v. RITENOUR and Another.

CONTRACT.—Consideration.—Promise for Benefit of Third Person.—Where a defendant-surety in a judgment which he is in danger of being compelled to pay (it being a lien on land belonging to him, and the principal defendant being insolvent), agrees to give up as canceled and satisfied a note which he holds against the principal defendant, if the judgment-plaintiff will accept such other surety as the principal defendant can procure, and will release and satisfy the judgment as to such defendant-surety, and, thereupon, the plaintiff enters satisfaction of the judgment and accepts other personal security procured by the principal debtor; there is a valuable consideration moving to the defendant-surety from the judgment-plaintiff, and also from the new surety; and the principal defendant, not a party to the agreement, may, whether it be made with the judgment-plaintiff or with the new surety, if it be intended for his benefit, but not otherwise, avail himself of it in an action against him on the note by such defendant-surety.

APPEAL from the Tippecanoe Common Pleas.

Mathews v. Ritenour and Another.

GREGORY, J.—Suit by Anthony Ritenour against Mathews on two promissory notes. The questions presented by counsel arise on the third and sixth paragraphs of the amended answer.

The third paragraph avers, that in April, 1862, one Clement G. Jones recovered a judgment in the Warren Circuit Court against the defendant, the plaintiff, and one William Ritenour, on a promissory note executed by Mathews as principal and Anthony and William Ritenour as sureties; that the judgment was \$1,969.20 and costs; that before and at the time the judgment was rendered, Mathews was in insolvent and embarrassed circumstances and unable to pay his debts; that the sureties were in danger of being compelled to pay the judgment; that the plaintiff, Ritenour, owned a large body of land in Warren county upon which the judgment was a lien; that he was anxious to be relieved, released, and discharged from liability on the judgment; and to that end, he agreed with Jones that if the latter would accept such other sureties as the defendant, Mathews, could procure, and release him (the plaintiff) from liability on the judgment, whereby his land would be unincumbered, then, and in that case, he, the plaintiff, would give up to the defendant as canceled and satisfied the notes in suit, and would release and discharge Mathews from liability thereon; that, in pursuance of the agreement, the defendant did procure other personal security which Jones accepted, and the latter thereupon entered a full release and satisfaction of the judgment; that the agreement was meant and intended for the benefit of the defendant, Mathews. Prayer, that the notes be canceled and surrendered, and for general relief.

The sixth paragraph avers a like agreement between the plaintiff and one Benjamin Judy and one James H. Keys, who became the new sureties to Jones for the amount of his judgment; but this paragraph omits the averment that the agreement was meant and intended for the benefit of Mathews.

Separate demurrers were sustained to each of these paragraphs, to which the appellant excepted.

There are two objections urged to the sufficiency of these paragraphs. The first is, that there is no consideration for the agreement; the other is, that Mathews cannot avail himself of it because he was not a party to it.

Valuable considerations are those which confer some benefit upon the party by whom the promise is made, or upon a third party at his instance or request, or from which some detriment is sustained, at the instance of the party promising, by the party in whose favor the promise is made. Ritenour was benefited by being released from the judgment; Jones gave up his judgment; Judy and Keys incurred liability by becoming sureties for Mathews to Jones. It is very clear that there was a valuable consideration for the agreement.

The next question is one of more difficulty. As Mathews was in embarrassed circumstances, both Jones and the new sureties had an interest in removing his liability to Ritenour on the note in suit; and it is clear to our minds that Jones could have a specific performance of the contract with him. It is equally clear that Judy and Keys could have a like performance of the contract with them. But the question whether Mathews can avail himself of this contract must turn on the alleged fact of its having been meant and intended for his benefit.

It is competent for the friends of one in embarrassed circumstances to compound his debts, and such transactions have always been upheld by the courts. Mathews owed two debts—one to Jones, and the other to Ritenour; he was embarrassed; he could perhaps pay the one if he were released from the other; there is nothing in the law which prohibits the making of a valid contract by which such a result would be reached.

Gwaltney v. Wheeler, 26 Ind. 415, is very much in point. In that case, Mrs. Wheeler sustained an action on an agree-

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ment made for her benefit in a contract between Gwaltney on the one side, and Reitz and Haney on the other. It is said by the judge speaking for the court, "Here is a promise in favor of Mrs. Wheeler, on a sufficient consideration, moving from Reitz and Haney, on the one side, to the defendant on the other. She is entitled to the benefit of such promise, and may sue in equity for a breach thereof." See, also, *Davis v. Calloway*, 30 Ind. 112; *Cross v. Truesdale*, 28 Ind. 44.

The sixth paragraph is bad for the want of the averment that the agreement was meant and intended for the benefit of Mathews.

The court erred in sustaining the demurrer to the third paragraph of the amended answer of the appellant.

The judgment is reversed, with costs, and the cause remanded, with direction to overrule the demurrer to the third paragraph of the amended answer, and for further proceedings.

J. H. Brown and *W. C. Wilson*, for appellant.

J. McCabe, for appellee.

TROOST v. DAVIS, Sheriff, and Others.

31	34
130	292
130	308
31	34
137	330
137	687
31	34
152	290

PRACTICE.—Code.—Law and Equity.—Under our code, the same protection to equitable rights may be invoked against a party seeking to enforce a right under a legal form as if such party were proceeding under equity forms.

MORTGAGE.—Subrogation.—Improvements.—Where mortgaged real estate has been sold and conveyed by the mortgagor to the mortgagee or his assignee, there being a junior judgment-lien thereon, and the vendee of such purchaser, without actual notice of such judgment-lien, has expended money in valuable permanent improvements, without which the value of the property would not exceed the mortgage; though the judgment-plaintiff has a complete legal remedy to enforce his lien by execution, yet, upon the application of such vendee, the execution-plaintiff will be required to exercise his

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legal right subject to the equitable right of the vendee, for whom the mortgage will be kept on foot, and to whom the value of the improvements will be allowed—the court, in taking account, charging the vendee with the value of the rents of the property, as it would have been without such improvements, for the time it has been held by him.

APPEAL from the Cass Circuit Court.

RAY, J.—The facts in this case are very simple, but their application involves an interesting question of law.

Freundenberger, in 1864, bought a lot in the city of Logansport, from Mary A. Smith, paying four hundred dollars cash, and executing a mortgage for twelve hundred dollars, the remaining purchase-money. Mrs. Smith, in July, 1867, assigned the mortgage to Allen Richardson. In 1865, Freundenberger improved the property and in said improvement incurred a debt of thirteen hundred dollars, for which he gave a second mortgage to said Richardson. Both mortgages were duly recorded. Prior to 1867, two hundred dollars of taxes accrued and became a lien upon said property. In March, 1867, Levy and others recovered a judgment against Freundenberger for nine hundred and twenty-five dollars. In September, 1867, Richardson instituted, in the Cass Circuit Court, a foreclosure suit upon his two above described mortgages. After service of process, and pending said suit, and to avoid the costs and expense thereof, he having no means wherewith to pay, Freundenberger reconveyed the property to Richardson. This deed was dated September 27th, 1867, and the same day Richardson conveyed to Troost who purchased the property in good faith, and immediately thereafter improved the same, to the extent of twenty-five hundred dollars, in a permanent brick structure. Troost paid sixteen hundred dollars to Richardson for the property, which, at that time, was its full value. At the time of said conveyance, the taxes, the mortgage for the purchase-money, and the improvement mortgage, all of which were prior liens to the Levy judgment, amounted to nearly twenty-six hundred dollars.

This suit was brought by Troost, on the 13th of Decem-

Troost v. Davis, Sheriff, and Others.

ber, 1867, setting forth the above facts, and alleging, that since his said purchase and improvement, Levy and his co-partners had issued an execution, and said entire property was levied upon thereunder, and the same was advertised by the sheriff (who was made a party in the bill), for public sale December 28th, 1867; and praying that an account be taken of the property and its value September 27th, 1867, the date of his purchase, and if found to be greater than the prior liens, then offering to bring the same into court, in cash, to be applied to the payment of said judgment; and, pending said account, praying that said sheriff's sale be enjoined.

To this complaint the defendants filed a general demurrer, and the same was sustained, and the bill dismissed for want of equity, and plaintiff charged with the costs of the application.

This demurrer presents the sole question in the record. Did the court err in sustaining it?

That, for the purpose of protecting the equities of Troost, the mortgages held by Richardson will be kept on foot, unless extinguished by Richardson's purchase of the lot, cannot be regarded as an open question in this State.

In the case of *Peet v. Beers*, 4 Ind. 46, this point is settled. Peet recovered a judgment at law in the Noble Circuit Court against one Nimmons. At the date of the recovery the judgment-debtor owned no real estate. He subsequently purchased a tract of land in Noble county, and simultaneously executed a mortgage on the premises to the vendor, to secure the remainder of the purchase-money. The Peet judgment was still unpaid. Nimmons sold the land to Beers, who, as part of the consideration, assumed the payment of the mortgage-lien; the remainder he paid to his vendor. Beers, in ignorance, as he alleged, of the Peet judgment, paid off the mortgage to Nimmons' vendor. Execution was issued in favor of Peet and levied on the land. Beers filed his bill in chancery and prayed that he might be subrogated to the right of the mortgagee whose

prior lien he had discharged. The court sustained his bill. In affirming the ruling, this court, after citing authority, use this language: "All that could have been levied upon, had Nimmons still held the land, is yet subject to Peet's execution. He is restricted in his levy to the interest of Nimmons, the judgment-debtor, in the property. So that the injunction cuts him off from no security which he ever had any right to claim. We therefore conclude that, as against Peet, Beers is entitled to be subrogated to all the rights and equities of the vendor whose lien he has paid."

It remains to inquire whether the mortgages held by Richardson were extinguished when he became the owner of the legal title and on the same day executed the deed for the land to Troost.

The clear weight of the authorities is, that merger never takes place except where the legal and equitable estates unite in the same person; and not even then when it is the clear intent of all parties in interest that it shall not take place; and such intent is indicated by the taking of an assignment of the mortgage in place of a satisfaction of the same. *Mickles v. Townsend*, 18 N. Y. 575; *Champney, Administrator, v. Coope*, 32 N. Y. 543; *Bascom v. Smith*, 34 N. Y. 320.

In the case of *Thompson v. Chandler*, 7 Maine, 318, it was held, that if the purchaser of an equity of redemption takes an assignment of the mortgage, this shall not operate to extinguish the mortgage, if it be for the interest of the assignee to uphold it.

In *Wells v. Morse*, 11 Ver. 9, this language is used: "This court will keep the mortgage on foot, if necessary for the purpose of justice, although the interest of the mortgagee and the equity of redemption unite in the same person."

The same rule is also announced in *Howe v. Woodruff*, 12 Ind. 214.

In *Glidewell v. Spaugh*, 26 Ind. 319, we adopted the language used by Chancellor WALWORTH in *Keirsted v. Avery*, that "it is now settled that a judgment-lien, being merely

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a general lien on the land of the debtor, is subject to every equity which existed against the land in the hands of the judgment-debtor at the time of the docketing of the judgment. And the court of chancery will protect the equitable rights of third persons against the legal lien, *and will limit that lien* to the actual interest which the judgment-debtor has in the estate." That interest, at the date of the docketing of the judgment in this case, was subject to the lien of the mortgage executed to Mrs. Smith for the purchase-money, and to the mortgage to Richardson for the improvements. It must remain so. The amount of the mortgage debts at the date of the sale to Troost was some twenty-six hundred dollars; the value of the lot was only sixteen hundred dollars. If Troost had at that time brought this action, he could have extinguished the judgment-lien by a sale under the mortgage. But having no actual notice of the judgment, he went on in good faith, believing the property free of incumbrance, and erected valuable improvements worth twenty-five hundred dollars. Shall the judgment-creditor have the benefit of this increased value given to the property, or will equity protect the purchaser?

As between the parties, the execution of the deed to Richardson, pending his foreclosure proceedings, was equivalent to a foreclosure and sale, and purchase by Richardson. The right of the judgment creditors to redeem, however, was not affected. Richardson and, as his assignee, Troost, were in possession as though under a foreclosure to which junior creditors had not been made parties.

The rule undoubtedly is, in states where the distinction between the forms and actions at law and suits in equity still exist, that if a party can enforce his lien at law, a court of equity will not interfere or relieve a purchaser or *bona fide* possessor, on account of money laid out in repairs or improvements, but if resort must be had to a court of equity to secure the relief, as in case of redemption, then equity will only grant the relief upon equitable terms, and will require the payment of all expenditures for improvements

which add value to the premises. Story Eq. §§ 1237, 1238.

But in our State, where the "distinction between actions at law and suits in equity and the forms of all such actions and suits are abolished," and where an equitable defense may be set up to a legal claim, it seems inconsistent to assert, that because a party is enforcing a right under a legal form, equity will not give the same protection to equitable rights that they would receive if the proceeding was under equity forms. All these distinctions in forms, as well as actions and suits, are abolished; and equity can be invoked under all circumstances where an equitable right calls for protection or enforcement.

Thus, although the execution-plaintiffs, have a complete legal remedy to enforce their lien, yet upon the application of the mortgagee who has become the purchaser of the real estate subject to such lien, and, without actual notice of such incumbrance, expended money in valuable permanent improvements, where without such improvements the value of the property would not exceed the mortgages, equity will compel the execution-plaintiffs to exercise their legal rights subject to the equitable right of the purchaser.

What, then, are his equitable rights in regard to the improvements of a permanent character, as against the judgment-creditor having a lien on the land?

In the case of *Wetmore, Executor, v. Roberts*, 10, How. Pr. 51, the Supreme Court of New York held, that where an assignee of a junior mortgage, whose assignment was recorded, was not notified of a statute foreclosure and sale under a prior mortgage, he had a right to redeem. But, it appearing that at the time of such sale the interest of the assignee was not worth anything, and that the purchaser purchased in good faith, supposing he was getting a good title in fee to the premises, and went on and made valuable improvements; in an action by the assignee for a foreclosure of his junior mortgage and sale of the premises, it was held, that the value at the time of this latter sale, of the perma-

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nent improvements so made upon said premises must be deducted; out of which sums the mortgagees of the purchaser who made the improvements, and other liens created by such purchaser, were to be paid, according to their priority, and the balance, if any, paid to the original purchaser, the remainder, if any, after such deduction, to be applied to the junior mortgage assignee and his costs.

In the case of *Mickles v. Dillaye*, 17 N. Y. 80, the Court of Appeals expressly approve the decision in *Wetmore v. Roberts*, *supra*, and they also hold, that where valuable and permanent improvements have been made in good faith, by a person standing upon the legal footing of a mortgagee in possession, but who supposed himself to have acquired the absolute title, and such mistake was favored by the omission of the mortgagor, for several years before and after the improvements, to assert any interest in the premises, the mortgagor, on asking the aid of equity to redeem, will be compelled to allow the value of the improvements, though exceeding the rents and profits received.

In *Benedict v. Gilman*, 4 Paige Ch. 58, the plaintiffs had purchased under a statute foreclosure which did not cut off the rights of judgment-creditors whose liens were subsequent to the mortgage, and he had taken possession and had made permanent improvements in ignorance of the existence of certain judgments in the hands of the defendants. He filed a bill claiming a strict foreclosure unless the defendants would pay up the mortgage and the value of the improvements, and this was decreed.

Judge STORY, indeed, states the doctrine broadly, that where the party making the improvements has acted *bona fide* and innocently, and there has been a substantial benefit conferred on the owner, he ought to pay for such benefit. Story Eq. § 1237.

The case before us is a strong one for the appellant. But for the improvements, the creditor could not secure anything by his lien, and he now seeks to avail himself of the money expended in good faith by an innocent party, to se-

cure his debt. We think the demurrer should have been overruled. If on the final trial the averments of the complaint shall be sustained, the court should determine the amount of increased value added to the property by the improvements made in good faith, and add thereto the amount of the mortgages and taxes, and charge the plaintiff with the value of the rent of the property, as it would have been without the improvements, for the time held by him, and then order a sale of the property, paying out of the proceeds the sum found due the plaintiff, and applying any balance to discharge the judgment and costs, and paying over the residue, if any, to the plaintiff. If no bid shall be made for the property exceeding the sum ascertained as due the plaintiff, the property should be struck off to him, and a deed ordered, free from the lien of the judgment.

The case is reversed, and remanded for further proceedings. Costs here.

D. P. Baldwin, for appellant.

S. T. McConnell and *M. Winfield*, for appellees.

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WIDOW.—Rights in Husband's Real Estate.—The rights of a surviving wife in the real estate of her husband are, in this State, those created by statute alone.

SAME.—Trust.—Descent.—A. purchased from B. certain real estate, for which he paid in money and in other land in the conveyance of which to B. the wife of A. joined with her husband. At A.'s request, and without the knowledge or consent of his wife, who supposed that the entire property so bought from B. was conveyed to her husband, a portion of it was conveyed by B., by deed absolute on its face, to C., a son of A. by a former marriage, and the deed was delivered by B. to A. Nothing of the transaction was known by C. till he received, in due course of mail, at his place of residence

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in another state, a letter written to him by A. on the day of the conveyance, informing him of the purchase and of the making of the deed to him as aforesaid, and that A. would want a deed from C., in a few days, to the children of E. and F., daughters of A. by said former marriage; that A. would send a deed for C. to sign in a few days; that the property was then in C.'s name, and that A. wished C. to tell the wife of the latter how it was situated then, so that she would know all about it if C. should be taken away; and if A. should, he wished the property so deeded to C. to be made over to said children, the rents and profits to be paid them yearly for their support, and when they should become twenty-one years old, "to have the property in fee simple, to be disposed of as they please;" that A. thought he had bought the B. property very low; that it cost B. a certain sum, "and as property is advancing, it must bring that again, but I shall not sell it, as it is in a good location, and will let the children have it;" and requesting C. to not let any one know but that he (C.) had paid for half the B. property. C. immediately answered A. by letter, acknowledging the receipt of the letter from A., and saying that C. had told his wife about the arrangement A. proposed making in case C. should be taken away, and that she would follow the injunction of A.'s letter, in that event. C. and his said wife had no children. Subsequently, without consideration, at A.'s request, C. and his said wife conveyed said real estate to A. for life, then in separate parcels, to E. and F. for life, remainders in fee simple to said children of E. and F. After the execution of the deed from B., A. made expensive improvements on the land so conveyed to C., collected rents, and paid taxes and assessments of all kinds. A. died, intestate, leaving his said wife and issue by her surviving him.

Held, that no use or trust resulted in favor of A. from said conveyance of B. to C., and that said letters did not create a trust in favor of A. or confer on him the right to the use, control, or disposition of the property conveyed to C., but that said letters did create a trust in favor of the children of E. and F. which a court of equity would have enforced.

Held, also, that the variation in the agreement between A. and C. did not affect the rights of A.'s surviving wife.

Held, also, that no interest in the real estate so conveyed to and by C. descended under the statute to the widow of A.

TRUST.—Executed Use.—Statute Construed.—Section 13, 1 G. & H. 652, applies where the trust is expressly declared and the beneficiary named in the conveyance, the title of the trustee being nominal only; in which case this statute executes the use.

APPEAL from the Tippecanoe Circuit Court.

This was a complaint against the appellants by Rebecca A. Dodge, claiming title, as the widow of Nathan B. Dodge, deceased, to an undivided third part of certain real estate.

Issues were formed, and the cause was submitted to the court for trial. The court found "for the plaintiff, and that

she is the owner in fee simple, as surviving widow of Nathan B. Dodge, deceased, of the undivided one-third of the land described in her complaint, and that she is entitled to a conveyance vesting in her said undivided interest."

A motion for a new trial having been overruled, judgment was rendered on the finding. A commissioner was thereupon appointed to make and execute to the plaintiff a deed of conveyance for the undivided third part of the real estate described in the complaint; which was accordingly executed, reported to the court, and approved.

One of the reasons filed for a new trial is, that the finding of the court is contrary to the evidence.

The facts of the case presented by the evidence are these:—

Nathan B. Dodge, the decedent, was twice married. The issue of the first marriage were a son, Joshua C. Dodge, and three daughters, Martha A. Gaylord, Mary J. Chadwick, wife of Rufus Chadwick, and Mrs. Granger. Martha A. Gaylord and Mary J. Chadwick, with their children, were the defendants below, and are the appellants in this court.

Nathan B. Dodge and Rebecca A., the appellee, were married on the 24th of July, 1850, and lived together until the death of the former on the 16th of May, 1866. The issue of their marriage, Nathan B. Dodge, Jr., who was born in November, 1851, still survives.

On the 9th of April, 1859, Nathan B. Dodge, Sr., purchased of Albert S. White certain real estate in the city of Lafayette, for the sum of twelve thousand dollars, of which the sum of four thousand dollars was paid by a conveyance to White of certain real estate then owned by said Nathan B. Dodge, Sr., in which conveyance the appellee joined. The residue of the purchase money was paid by said Nathan B., in cash.

On the day of the purchase, White, by the direction of Nathan B. Dodge, Sr., and without the knowledge of the appellee, conveyed a part of the real estate sold by him, of

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the estimated value of eight thousand dollars, and which is the subject of this suit, to Joshua C. Dodge, the son of said Nathan B. and then residing in Boston, Massachusetts. This deed was absolute on its face, no trust being declared therein; but it was delivered to Nathan B. Dodge, Sr., who, on the same day, wrote to his son, Joshua C., as follows:—

“LAFAYETTE, April 9th, 1859.

“I have this day purchased the A. S. White property. I pay twelve thousand six hundred dollars for it. I have fourteen rods on Columbia street, twelve rods on Missouri street, and eighty-one feet fronting on South street. I gave him the house I live in, at thirty-two hundred dollars, a lot that I got in payment for my farm, at three hundred dollars, and six thousand dollars cash in hand, one thousand dollars on the first day of July next, one thousand dollars in six months, six hundred dollars in one year from to-day. I have had a deed made out to you for the property where he lives, that is, the cottage and the larger house, one hundred and forty-five feet on Columbia street and twelve rods on Missouri street. I shall build myself a house, for my own residence, on eighty-one feet and twelve rods back, on the east side of the lot, and a house for rent on the South street eighty-one feet front. The property is now renting for eight hundred dollars per year; the property that is deeded to you is worth about eight thousand five hundred dollars, and that I shall want a deed from you in a few days to Mrs. Gaylord’s children and Mrs. Chadwick’s. I shall send on a deed for you to sign in a few days. The property is now in your name, and I wish you would tell your wife how it is situated now, that she would know all about it if you should be taken away; and if I should, I want that property that is deeded to you to be made over to the four children, the rents and profits to be paid them yearly for their support, and when they become twenty-one years old to have the property in fee simple, to dispose of as they please.” * *

“I think I have bought the White property very low. It cost him sixteen thousand dollars, and as property is all the

time advancing, it must bring that again; but I shall not sell it, as it is in a good location, and will let the children have it.

"Yours truly,

"N. B. DODGE.

"Do not let any one know but that you have paid for half the White property."

To this Joshua C. Dodge responded by the following letter:—

"BOSTON, April 18th, 1859.

"FATHER, Yours of the 9th was duly received and contents noticed. I have told Fanny all about the arrangements you proposed making in case I should be taken away, and she would follow the injunction of your letter to me, in that event.

"Yours truly,

"J. C. DODGE."

The "Fanny" mentioned in this letter was the wife of J. C. Dodge, and they have no children.

The appellee testified, that "the fact that any part of this property purchased from White had been conveyed to Joshua C. Dodge, was first communicated to her by somebody, along in the fall of the year after the purchase, until which time she had supposed the deed from White and wife, for all the property bought from White, had been executed to her husband. It was so conveyed without her knowledge or consent, and her husband never spoke to her of its having been so conveyed."

November 16th, 1860, a portion of the realty conveyed to Joshua C. Dodge was by him and his wife conveyed to the decedent, Nathan B. Dodge, for his life, remainder to appellant Martha A. Gaylord, for her life, remainder in fee to her children, Thomas F. and Harry C. Gaylord. The deed contains some limitations on the power of said Martha A., and provides for cross remainders between her children.

March 5th, 1862, Joshua C. Dodge and wife conveyed

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the residue of this realty to the decedent for his life, remainder to Mary J. Chadwick for her life, remainder in fee to her children, Nathan R., Lewis A., and Ida Chadwick, with similar limitations and cross remainders. Lewis A. had died before the filing of the complaint.

After the execution of the deeds from White, the decedent made expensive improvements on the realty described in the complaint, received rents, and paid taxes and assessments of all kinds.

Joshua C. Dodge, whose deposition was read in evidence, testifies, that he is the son of decedent, Nathan B. Dodge, and is thirty-eight years of age; that up to 1857 he resided in Lafayette, and did business as a partner with his father; that he then removed to Boston, and has resided there since; that he and Martha A. Gaylord, Mary J. Chadwick, and Mrs. Granger are the children of the decedent by his first wife, and that Nathan B. Dodge, Jr., is the only child by the last wife—these being the sole heirs at law; that at the time of the conveyance to him from White, the condition of his father's children was as follows: Mrs. Gaylord was a widow with two children (the eldest being now seventeen years old), and without any means; Mrs. Chadwick had two children, a third (Ida) being born soon after, and was without means except the earnings of her husband as a clerk; Mrs. Granger's husband was in comfortable circumstances, and the witness had ample means of his own; the remaining child, Nathan B. Dodge, Jr., (now about fifteen years of age) was unprovided for; their conditions remained about the same, except as changed by these conveyances and his father's death; that witness paid no part of the consideration to White, and knew nothing of the purchase from him, until he received, in due course of mail, at Boston, a letter from his father, attached to his deposition, which letter he answered by mail, and the answer had been found at Lafayette, and this he also attached; that the deeds executed by himself and wife were prepared at Lafayette, and forwarded or brought to Boston by his father, and executed by himself and wife at the

date of the acknowledgments, and returned to his father; that for none of these deeds was any consideration paid to him; that the relation between the witness and his father had always been of the kindest and most confidential character; that before the purchase from White there was a verbal understanding between the witness and his father, that his father "should provide for my two sisters, Mrs. Gaylord and Mrs. Chadwick, and give them more property than he would give to his other children; there was also an understanding between us, that, in consideration of his so doing, I would give my sister, Mrs. Gaylord, two hundred dollars per year, during the life of my father;" that the witness had made this contribution, while his father lived.

Witness received a deed dated December 16th, 1861, for some other property, purchased and paid for by his father, and subsequently, on his father's request, executed a deed therefor, dated February 25th, 1864, to his father for life, remainder in fee to Nathan B. Dodge, Jr.

He further testified, that his father during his life had given some money to Mrs. Granger.

It further appears that the decedent in his lifetime conveyed a part of the real estate conveyed to him by White to his son Nathan B. Dodge, Jr., which, with that conveyed to the latter by Joshua C. Dodge, and the improvements made thereon by the decedent in his lifetime, equaled in value the advancement to either of the other children.

The decedent died intestate, and his personal estate, after the payment of all debts, &c., will amount to sixty thousand dollars. He was also seized at his death of the real estate conveyed to him by White, except that part thereof conveyed by him to his son Nathan B. Dodge, Jr.

ELLIOTT, J.—Tenancies in dower, having been abolished by statute, no longer exist in this State. The rights of a surviving wife in the real estate of her husband are those created by statute alone, and hence the question presented here must be determined by reference to the provisions of the statute on that subject.

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These rights, so far as they are involved in this case, are defined by sections 17 and 27 of the statute of descents, which are as follows:

"Sec. 17. If a husband die testate, or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors; *Provided, however,* That where the real estate exceeds in value ten thousand dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth only as against creditors."

"Sec. 27. A surviving wife is entitled, except as in section 17 excepted, to one-third of all the real estate of which her husband may have been seized in fee simple, at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law; and also of all lands in which her husband had an equitable interest at the time of his death," &c.

There is no conflict between these sections when construed together. Section 17 defines the rights of the widow as against creditors; whilst the 27th section recognizes the exception made in favor of creditors in section 17, and defines the rights of the surviving wife as against heirs and purchasers either from or through the husband in his lifetime, and defines the nature and character of the estates and interests held by her husband in which she is entitled to share.

In the case now before us, no question is presented as to creditors; and, hence, we must look to section 27 in determining the nature of the estate or interest that must have been held by the husband in the land, to entitle his surviving wife to a share therein. That section declares that she is entitled to one-third of all the real estate of which her husband may have been seized *in fee simple*, at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law; and also of all lands in which her husband had *an equitable interest at the time of his death*.

Here, the land in controversy was conveyed by White, not to the decedent, but to Joshua C. Dodge; but it is claimed by the appellee's counsel, that, by virtue of that conveyance, Nathan B. Dodge, the decedent, became seized in fee of the property. The argument in support of this proposition is, that the conveyance to Joshua C. Dodge was in trust; that his title was a nominal one merely; that the property was subject to the exclusive use, control, and *jus disponendi* of his father, Nathan B. Dodge; and that the 13th section of the act concerning trusts and powers (1 G. & H. 652) executed the use, and invested Nathan B. Dodge as *cestuy que use* with the fee simple.

The provision referred to reads as follows:—

“A conveyance or devise of lands to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary.”

In this case the deed from White to Joshua C. Dodge is an absolute conveyance in fee. It contains no declaration of trust in favor of any one. And though the purchase money was paid by Nathan B. Dodge, and the conveyance was made by his direction to Joshua C. Dodge, without any consideration being paid therefor by the latter, still, under section 6 of the act just referred to, no use or trust resulted therefrom in favor of Nathan B. Dodge.

The 13th section of the act, copied above, clearly applies where the trust is expressly declared and the beneficiary named in the conveyance, the title of the trustee being nominal only. In that case the statute operates on the conveyance itself, and executes the use, by declaring the conveyance void as to the trustee and holding it to be a direct conveyance to the beneficiary; but it is difficult to see how it can apply so as to invest the legal estate in the beneficiary when the conveyance is absolute on its face and neither declares a trust nor names a beneficiary. But we

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need not decide that question. As stated above, the payment of the purchase money by Nathan B. Dodge did not raise a resulting trust in his favor; and in the absence of a declaration of trust by Joshua C. Dodge, or an agreement by him to hold the land in trust, the conveyance by White to him would invest him with an absolute estate in fee simple. We must therefore look to the letter of Nathan B. to Joshua C. Dodge and the response of the latter thereto, to ascertain the nature of the trust created thereby as well as the beneficiaries.

It is insisted by the appellee, that the letters referred to show that Joshua C. Dodge held but a naked title to the property, whilst Nathan B. Dodge, Sr. was the beneficiary and entitled to its exclusive use, control, and disposition. We find nothing in the letters to warrant such a conclusion; nor do we see how it is possible to place such a construction upon them.

In his letter, Nathan B. Dodge, after describing the property purchased of White, and the terms of the purchase, says: "I have had a deed made out to you for the property where he" (White) "lives, that is, the cottage and the large house, 145 feet on Columbia street." * * * "The property that is deeded to you is worth about \$8,500, and that I shall want a deed from you in a few days to *Mrs. Gaylord's children and Mrs. Chadwick's*. I shall send on a deed for you to sign in a few days. The property is now in your name, and I wish you would tell your wife how it is situated now, that she would know all about it if you should be taken away; and if I should, I want that property that is deeded to you *to be made over to the four children*, the rents and profits to be paid them yearly for their support, and when they become twenty-one years of age *to have the property in fee simple*, to dispose of as they please. I think I have bought the White property very low. It cost him sixteen thousand dollars, and as property is all the time advancing, it must bring that again; but I shall not sell it, as it is in a good location, and *will let the children have it*." To this

Joshua C. Dodge responded, accepting the trust as declared in the letter to him.

There is certainly nothing in these letters creating a trust in favor of Nathan B. Dodge, the decedent, or conferring on him the right to the use, control, or disposition of the property. We think they did create a trust in favor of the children of Mrs. Gaylord and Mrs. Chadwick, which a court of equity would have enforced.

It is true, that Joshua C. Dodge did not execute the trust according to the terms of the agreement, but, at the request of the decedent, conveyed the property to him for life and then in separate parcels to Mrs. Gaylord and Mrs. Chadwick for life, with remainders to their children in fee. This variation, however, did not in any wise affect the rights of the appellee, and therefore affords to her no cause of complaint.

From the view thus taken of the case, we conclude that Nathan B. Dodge was not, at any time during the coverture, seized in fee simple of the premises in controversy, nor had he any equitable interest therein at the time of his death, and hence, that no interest therein descended from the decedent to the appellee, under the statute.

We think the evidence did not sustain the finding of the court, and for that reason a new trial should have been granted.

The judgment is reversed, with costs, and the cause remanded for a new trial, and for further proceedings in accordance with this opinion.

GREGORY, J., was absent.

R. Jones, S. A. Huff, B. W. Langdon, and R. P. Ranney, for appellants.

J. A. Stein, W. C. Wilson, and Z. Baird, for appellee.

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PRINCIPAL AND SURETY.—*Extension of Time.*—*Contract.*—An oral agreement by the payee of a promissory note with the principal maker, without the knowledge or consent of the surety whose suretyship is known to the payee, to extend the time of payment during a definite period beyond the maturity of the paper, is valid, and releases the surety, if founded upon a sufficient consideration.

SAME.—*Consideration.*—*Interest.*—The oral agreement of the principal debtor to pay merely the same interest that the note would have borne if the indulgence had been given voluntarily, is a sufficient consideration for such a promise of forbearance.

APPEAL from the Tippecanoe Common Pleas.

FRAZER, J.—This was a suit upon a promissory note against the appellant and another. The principal question before us is whether the second and third paragraphs of the answer were sufficient. The court below held them bad on demurrer. This ruling involved but a single question, to wit, whether an oral agreement by the payee with the principal maker of the note, to extend the time of payment during a definite period beyond the maturity of the paper is valid, the consideration for such further indulgence being a similar agreement by the principal to pay interest at the rate of ten per cent. per annum during the time of extension of payment after maturity, the defendant being merely a surety, which was known to the payee, and the agreement having been made without his knowledge or consent.

At the time of the contract, February 21st, 1866, no greater rate of interest than six per cent. per annum was permitted by law, though that rate was recoverable when the contract was for more. In the case before us, then, the legal effect of the agreement was for precisely the same interest that the note would have borne without the new contract.

It is well settled, that such a contract will, if valid, discharge the surety. It deprives him of the right to pay the

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debt at maturity, and then to proceed at once to recover from the principal debtor the amount so paid—and thereby it increases his hazard, in view of the fact that the principal may become insolvent before the lapse of the additional time given for payment. It takes from the surety a right which he had under the contract into which he entered, the exercise of which may be essential to his indemnity.

In the case before us the validity of the contract pleaded seems unquestioned, unless it is not founded upon a sufficient consideration. Is the agreement of the principal debtor to pay merely the interest which the note would have borne, and as might have been required by its terms, if indulgence had been given voluntarily, such sufficient consideration? This inquiry, upon which the highest courts of the several states are not in harmony, is presented for our consideration without the aid of any argument whatever on behalf of the appellee.

This precise question has been determined in the affirmative by the highest courts of New Hampshire, Maine, and Ohio (*Wheat v. Kendall*, 6 N. H. 504; *Bailey v. Adams*, 10 *id.* 162; *Chute v. Pattee*, 37 Maine, 102; *McComb v. Kittridge*, 14 O. 348); and in the negative in New York (*Gahn v. Niemcewicz's Ex'rs*, 11 Wend. 312). It was also probably intended to decide the question in the negative in *Harter v. Moore*, 5 Blackf. 367, though, as will be seen, that case did not necessarily call for a solution of the question.

A little consideration of the history of the law upon this subject and an examination of the question in the light of elementary principles has satisfied a majority of the court that the doctrine as held in New Hampshire, Maine, and Ohio, is correct.

The whole doctrine as to the discharge of sureties by giving time to the principal debtor had its origin in the courts of equity, whence it was finally transplanted into the common law. Sureties are favorites, and will not be held beyond the strict scope of their engagements. In the exigencies of business, men are frequently liable to be called

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upon, as an act of neighborly kindness, and without any motive of personal advantage, to become sureties in various ways; and when, in such cases, the principal debtor is overtaken by insolvency, it becomes a question which of two innocent parties shall suffer loss. The utmost good faith is therefore required of the creditor, and the liability of the surety is *strictissimi juris*.

The original doctrine upon the question in hand was declared by Chancellor STILLINGTON, as early as the reign of Edward IV., that when the creditor, without the consent of the surety, gave time to the principal debtor, *by agreement*, the surety was discharged; nor was it required that such agreement should be supported by a consideration. And this seems to have been well settled as the rule in England for ages. 1 Spence Eq. Jurisd. 688. But in times quite modern the doctrine sprung up, as it is now established, that to discharge the surety the agreement to give time must be supported by a consideration. Spence, *supra*; Chit. Bills, 413.

This brief reference to the history of the law, showing its origin and growth, is made for the purpose of exhibiting it as it existed when our ancestors brought it with them to this continent, that it may distinctly appear that nothing of its ancient condition gives any support whatever to the doctrine of the anomalous cases mentioned, which, as we must think, without a very full consideration of the subject, substantially rule, that an agreement to pay interest for the forbearance of money for a definite time is not a sufficient consideration for a promise to forbear, when the original debt bears the same rate of interest. It is true, that if the time had been voluntarily given, the note would have drawn the same rate of interest promised to be paid. But if this be an argument, it assumes that the principal debtor and surety would, in any event, have failed to pay until the lapse of the period of indulgence given by the agreement. It assumes that men will never discharge an interest bearing obligation to avoid the payment of interest, and that it

is not to the debtor's advantage to pay the debt for the purpose of stopping the interest; and, moreover, that it is not beneficial to the creditor to obtain a contract which will continue his investment for a definite period for the sake of the lawful interest. But when it is borne in mind that in every commercial country men and moneyed corporations are constantly seeking to loan money for definite periods, for the profit derived from interest, and that they grow rich by the operation, and that debtors frequently seek the opportunity to pay their interest bearing debts before maturity in order to save interest, it will not be very apparent that where the creditor bars the right of payment to him at the maturity of the obligation, by a new contract, and continues the investment at interest for an additional definite period, payable at the expiration of that period, he will derive no benefit from the performance of the new contract. The benefit of such a contract to the creditor is, that he continues the loan for a specified time, when without the contract the debtor might lawfully pay at once, and thus stop interest. So that it might as well be contended that an original contract of loan for a given time at lawful interest shall not bind the lender to wait for his money until the lapse of the time stipulated. The consideration for the performance is in the one case precisely as valuable as in the other.

These considerations seem to have been wholly overlooked in both the cases mentioned, which are adverse to the views we entertain. In the case in 5 Blackf. they were not suggested in argument, and the opinion in that case indicates that they escaped the attention of the eminent judge who delivered it. Indeed, that case did not necessarily call for a decision of the question, the pleading being bad, according to authority, for the reason that it did not show that the agreement to give time was for a definite period. There is reason to believe that the question did not receive very full consideration. The authorities do not seem to have been examined, nor was there any argument

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which could aid the court. The case in 11 Wend. 312, seems to have been decided upon the authority of *Philpot v. Briant*, 4 Bing. 717, and the manuscript case stated in Chitty on Bills, 413, n. (y); and it is exceedingly difficult to determine from the opinion in the New York case, or, indeed, in *Philpot v. Briant*, the process of reasoning by which the conclusion was reached, if, indeed, it was reached, that the agreement to give time was without consideration. That both cases were correctly determined is obvious enough. In the New York case there was no agreement to give time—and surely that was enough—and in the English case the promise on which the forbearance was given was void by the statute of frauds. Such cases can be of but slight weight, and surely should not control when both principle and respectable authority are found to be adverse to them.

Judgment reversed, with costs; cause remanded, with directions to overrule the demurrers.

ELLIOTT, J., dissented.

R. P. Davidson and W. D. Wallace, for appellant.

W. C. Wilson, for appellee.

 McCaw and Others v. BURK and Another.

PRACTICE.—*Weight of Evidence.*—Where there is a conflict in the testimony, this court will not reverse a judgment on the weight of the evidence.

CONVEYANCE.—*Consideration.*—A deed of conveyance of real estate is good between the parties thereto without any consideration.

VOLUNTARY CONVEYANCE.—*Trust.*—Where a husband voluntarily conveys real estate to his wife, or a father to his child, no trust arises in his favor, but the presumption is that the conveyance is intended as a provision or advancement. This presumption is not conclusive. The *onus* of removing it is upon him who insists that a trust exists.

SAME.—*Marriage.*—The owner in fee of certain real estate conveyed the same

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in fee, his wife joining in the deed, to his brother, who, having received the title for such purpose, immediately conveyed in fee to the wife and minor daughter of the original grantor. Both deeds were voluntary, the former expressing a consideration in a certain sum, the latter none. After the deeds were recorded, the daughter intermarried with one who had knowledge of the deeds and believed her to be the lawful owner of the land so conveyed to her. The daughter died, leaving one child, the only issue of such marriage; and the child died, leaving its father its sole heir at law.

Held, in a suit by the surviving father of such child for partition, the original grantor still retaining possession, that no trust resulted to such grantor under the deeds.

Held, also, that the marriage of the daughter made her a purchaser for a valuable consideration, and it would be a fraud upon her husband to withdraw the estate passed to her.

Held, also, that the plaintiff was entitled to possession of the land so conveyed to said daughter.

APPEAL from the Marion Circuit Court.

GREGORY, J.—Prior to the 12th of June, 1860, William McCaw, one of the appellants, was the owner in fee of some two hundred and forty acres of land in Marion county. On that day he conveyed the land, his wife joining in the deed, to his brother, Nelson McCaw, and Nelson and wife immediately conveyed the land to the wife and two daughters of William.

Shortly after these deeds were executed, one Ray obtained a judgment against William McCaw for several hundred dollars, upon which execution was issued to the sheriff of Marion county, who levied upon, duly advertised, and sold twenty acres of the land to satisfy the execution; and the appellee Hosbrook purchased the twenty acres, paid his money, and received a sheriff's deed therefor. None of the parties, Ray, Hosbrook, or the sheriff, knew at the time of the sale that McCaw had put the property out of his hands. In a short time thereafter Hosbrook informed McCaw of his purchase, and wanted to know when he could have possession. McCaw then told Hosbrook, that the land did not belong to him, McCaw, but to his wife and children; that he had conveyed to them some time before the judgment

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and sale; that the deeds were *bona fide*; and that he, McCaw, had no sort of title to, or interest in, the land.

Hosbrook commenced a suit to set aside the deeds, on the ground that they were made to hinder, delay, and defraud the creditors of William McCaw. McCaw appeared, and filed the general denial, and had the case continued on his affidavit, in which he swore, that he could prove by one Todd that the deeds were *bona fide* and made for a valuable consideration, and that these facts were true.

Burk, the appellee, on the 11th of March, 1862, married Eliza J. McCaw, the daughter of William, and one of the grantees in the deed from Nelson.

Burk knew of the deeds—they were upon record—and believed her to be lawful owner of one third of the land. On the 24th of April, 1863, Mrs. Burk gave birth to a living child, the issue of the marriage, and died a few days afterwards, leaving her child and her husband surviving her. On the 11th or 12th of May, afterwards, the child died, leaving the father, Jacob J. Burk, its sole heir at law.

Burk compromised with Hosbrook, the latter consenting to take a share of the land from the former and waiving his right to recover on the sheriff's deed. Accordingly, Burk conveyed a moiety of his interest in the land to Hosbrook, and Burk and Hosbrook immediately commenced a suit for partition of the lands. William McCaw was made one of the defendants. It is not charged in the complaint that he is the owner of any portion of the land; but that he is in possession of eighty acres thereof. The other one hundred and sixty acres were then, and had been for years past, in the possession of William's mother, who lived with him, and had a sort of life estate in the one hundred and sixty acres, and received the rents for her support.

The complaint is in the statutory form. William and Maria each answered by the general denial; and Nancy, a minor, pleaded the same issue by guardian *ad litem*. William filed a second paragraph of answer, setting up, that the deeds from himself and wife to Nelson McCaw and

from the latter and wife to the wife and daughters of William, were only intended as a mortgage to secure Maria (the wife) for a debt due to her from William; that the former was the owner in her own right of certain other lands which could be readily sold, and that William, being in debt, wanted to sell her lands to raise money to pay his debts; that Maria consented, and thereupon William made these deeds as a mortgage to his wife and two daughters, to secure a debt due his wife alone; that William thereupon consulted Robert L. Walpole, an attorney, who advised him that he could redeem his land from these deeds, at any time, by paying the wife what he owed her, and that when he had done this the land would revert in him discharged of all claims and incumbrances; that, at the time the deeds were made, Walpole drafted an instrument in writing which set forth the object of making the deeds, and recited that upon payment of the debt due his wife by William, the lands should revert in him, William; that the instrument was signed by Nelson McCaw, Maria McCaw, and R. L. Walpole, and left with Walpole, and is lost; that the two daughters only held the land in trust for William; and that Burk had notice of the trust.

To this paragraph of the answer Burk and Hosbrook each replied the general denial, and also a special reply, in which it is averred, that the deed from William and his wife to his brother, Nelson, was upon its face an unconditional deed in fee simple, without any condition or trust other than that Nelson should convey the lands in fee simple to the wife and children of William, to be held by them as tenants in common, in equal shares, in fee simple; that Nelson conveyed the lands accordingly; that Eliza was then a minor; that on the 11th of March, 1862, Burk married said Eliza, supposing her to be the owner in fee simple of an undivided third part of the land by deed then of record, and without any notice or knowledge that the deed to Eliza and others was subject to any trust, or mortgage, or defeasance whatever; that on the 24th of April, 1863, Eliza

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gave birth to a child, the issue of their marriage; that Eliza died April 30th, 1868, and the child died May 13th, 1868, leaving the father, Burk, its sole heir at law.

William demurred to this paragraph of the reply. The demurrer was overruled.

The case was tried by the court, finding as follows:—

"1. That the deeds from William McCaw and wife to Nelson McCaw and from Nelson McCaw and wife to Maria, Eliza, and Nancy McCaw, for the premises in controversy, do not upon their face import a trust in favor of said William.

"2. That said deeds were not executed as a mortgage.

"3. That said deeds were voluntary;—that from Wm. McCaw to Nelson expressing a consideration of \$3,000, the other expressing none.

"4. That about two years after the execution and recording thereof, the plaintiff Burk intermarried with Eliza, one of the grantees; that about one year after said marriage, a child was born, the issue thereof; that soon after the birth of said child, Eliza, the mother, died; and soon after her death, and before the commencement of this suit, the said child died also.

"5. That Nelson McCaw is the brother of William, Maria the wife of William, and Nancy and Eliza his daughters; the said Nancy and Eliza being infants at the time of the execution of said conveyances.

"6. That William McCaw has been in possession of eighty acres of the land ever since the execution of said conveyances, and the plaintiff Burk and wife have not resided upon or had possession of any portion of the premises in controversy since their marriage. That the plaintiffs are entitled to one equal third part of the land described in the complaint whereof partition is claimed."

The appellants moved for a new trial; the motion was overruled, and they excepted.

The evidence is made a part of the record by a bill of exceptions.

There is a clear conflict in the evidence as to whether the deeds under which the appellees claim title were executed as a mortgage.

This court would not reverse a judgment on the weight of the evidence. It is, however, but just to the learned judge who tried this case in the court below, to say that we have carefully considered the testimony and are entirely satisfied with the finding.

There are three grounds upon which the appellants claim a ruling in their favor. The first turns upon a question of fact, which we have already noticed. The second is, that the deed from William to Nelson and that from the latter to Maria and the two daughters being voluntary, and the latter expressing no consideration, Maria, Eliza, and Nancy only took the land in trust for William McCaw; consequently, that there was no estate in Eliza descendible to Burk, and he is without interest in the premises. The third is, that the deeds being voluntary, and the grantor, William, having continued in possession, the court can not enforce them by giving the grantees possession.

There is a consideration named in the deed from William to Nelson. This deed passed the title out of the former and vested it in the latter, subject only to the trust assumed of passing it over to the wife and daughters. Indeed, it was but one transaction. Nelson McCaw was the mere conduit through which the title passed from William McCaw to his wife and two daughters.

Whatever the rule may be as between parties not bearing the relationship of husband and wife or parent and child, it is clear that when a husband voluntarily conveys to his wife, or a father to his child, no trust arises in his favor, but the presumption is that the conveyance was intended as a provision or advancement. This presumption is not conclusive. The *onus*, however, of removing it is upon him who insists that a trust exists.

It has been repeatedly held by this court, that a deed is good between the parties without any consideration. *Ran-*

Compton v. Davidson and Another.

dall v. Ghent, 19 Ind. 271; *Thompson v. Thompson*, 9 Ind. 323; *Doe v. Hurd*, 7 Blackf. 510; *McNeely v. Rucker*, 6 Blackf. 391.

The third proposition remains to be considered. No aid will be given to compel the execution of a gift; but that principle does not apply to this case. Here the deeds were executed, the title passed, and only a naked possession remained in the grantor.

But independent of this, the subsequent marriage of Eliza made her a purchaser for a valuable consideration, and it would be a fraud on her husband to withdraw the estate passed to her. *Sterry v. Arden*, 1 Johns. Ch. 261; *Brown v. Carter*, 5 Vesey, 861.

The court committed no error in overruling the demurrer to the second paragraph of the reply, or in overruling the motion for a new trial.

Judgment affirmed, with costs.

S. Major, for appellants.

L. Barbour and *C. P. Jacobs*, for appellees.

COMPTON v. DAVIDSON and Another.

PROMISSORY NOTE.—*Pleading*.—*Bastardy*.—It is not a good defense to a suit upon a promissory note given in compromise of a prosecution against the maker for bastardy, "that it was *understood* that if the child should be born too soon, or the circumstances would not make out a case of bastardy, the note was to be delivered up, and that the child was born *eight months* from the time the defendant first met the prosecuting witness;" nor is it a good answer, "that the defendant has since learned that he could prove he was not the father, but could not make such proof at the date of the compromise."

SAME.—*Party Plaintiff*.—It is not necessary that the plaintiff in a suit upon a promissory note should be the legal owner thereof;—it is sufficient if he is the equitable owner.

PLEADING.—*Written Instrument.*—Where a defense is founded upon a written agreement, the instrument should be set out.

APPEAL from the Tippecanoe Common Pleas.

RAY, J.—Suit by appellees on a note executed to them by appellant. Answer, that said note was obtained by fraud and false and scandalous representations made by one Mary Wallace, and by her attorneys who are the present appellees; that it was alleged, that said Mary was *enceinte* with a bastard child, and a suit was threatened against him; that said Mary made the proper affidavit before a justice of the peace, and he thereupon executed the said note, but it was understood, that if the child was born too soon, or if the circumstances would not make out a case of bastardy, the note was to be delivered up; that said child was born within eight months from the time he first met the said Mary; wherefore he demands judgment.

The answer fails to show any agreement to deliver up the note. It does not allege such an agreement, but simply that it was understood it should be delivered up. By whom was it understood? Nor does the fact that the child was born within eight months acquit him of the liability. The court properly sustained a demurrer to the paragraph.

A second paragraph of answer denied that the plaintiffs were the legal owners of the note in suit. If they were the equitable owners it was sufficient.

A third paragraph alleges, that the note was given under duress and threats of public scandal and disgrace, and that one Mary Wallace would bring an action in bastardy, and would make an affidavit that she was pregnant with a bastard child and that the defendant was the father; that she did so swear; and that he had since learned that he could prove he was not the father, but could not make such proof at the date of the compromise. A demurrer was sustained to this paragraph. There was no error in this. The answer does not deny the condition of Mary Wallace, or that circumstances were against his defense when he

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compromised. The case seems to have been one for compromise, and his answer may be, perhaps, properly styled a negative pregnant.

A fourth paragraph alleged a written agreement executed at the date of the note, by which said Mary Wallace agreed to leave the city of Lafayette and remain away from there, and her failure to comply with the written contract. The agreement is not copied. As that was the foundation of the defense, it should have been set out.

The court properly sustained a demurrer to the paragraph. Judgment affirmed, with five per cent. damages and costs. *A. J. Roush*, for appellant.

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RISSEL v. THE STATE.

CRIMINAL LAW.—*Information.*—*Arrest of Judgment.*—An information which is so uncertain that upon a plea of guilty the court cannot know what punishment it may affix, is bad on motion in arrest of judgment.

SAME.—*Sunday.*—*Liquor Law.*—Information charging, that "A., at, &c., being over fourteen years of age, on, &c., that being the first day of the week, commonly called Sunday, was found unlawfully at common labor and engaged in his usual avocation, to wit, selling and dealing out to B. two gills of whiskey, and receiving therefor twenty cents," &c.

Held, that as it did not appear from the information whether or not the defendant had a license, it was bad on a motion in arrest based upon the ground that it did not state facts sufficient to constitute a public offense.

APPEAL from the Dearborn Common Pleas.

FRAZER, J.—These cases are exactly alike. The information charges, that "A., at, &c., being over fourteen years of age, on the 17th day of February, 1867, that being the first day of the week, commonly called Sunday, was found unlawfully at common labor and engaged in his usual avoca-

tion, to wit, selling and dealing out to B. two gills of whiskey, and receiving therefor twenty cents," &c. The plea of the defendant was, "that he is guilty as therein charged, but he says that on the said 17th day of February, 1867, he was duly licensed to retail intoxicating liquors under the act of March 5th, 1859." And thereupon, without any trial, a fine of five dollars was assessed by the court, and judgment entered thereon, after overruling a motion by the defendant in arrest of judgment based upon the ground that the information did not state sufficient facts to constitute a public offense.

The only error assigned is, that the motion in arrest was overruled.

There is no argument for the State. The information seems to have been a copy of one which was held good by this court in *Voglesong v. The State*, 9 Ind. 112. But since that case the legislature has passed several acts which we think very materially affect the question. Now, only those who are licensed can lawfully engage, on any day, in the business of selling liquors in less quantity than a quart, without incurring a penalty. Those who are so licensed are subject to a special penalty for doing it on Sunday, which is more severe than that which the law imposes upon other violations of the Sabbath. 1 G. & H. 614; Acts. Spec. Sess. 1865, p. 197.

The obvious purpose of the pleader was to charge an ordinary violation of the Sabbath, punishable as a violation of the act of 1855 for the protection of the Sabbath. But it is impossible to learn from the information whether the defendant violated that act or the act of 1865, *supra*. Indeed, if he had no license to sell liquor, then the act charged was unlawful on any day and punishable by a higher penalty than as a mere violation of the Sabbath. The sum of the matter is, that it could not be ascertained from the information what statute the defendant had violated, inasmuch as it was not alleged whether or not he had a license;

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and the court could not upon a simple plea of guilty have known what punishment to assess. If licensed, the fine could be any sum not less than ten dollars nor more than fifty dollars; whereas an ordinary violation of the Sabbath might be punished by a fine in any sum from one dollar to ten dollars. From necessity, an information which is so uncertain that upon a plea of guilty the court cannot know what punishment it may affix, is bad on motion in arrest of judgment. It charges no particular public offense, and the second clause of section 144 of the criminal code settles the question.

Reversed and remanded, with directions to sustain the motion in arrest of judgment.

GREGORY, J., dissented.

J. Schwartz, for appellants.

D. E. Williamson, Attorney General, for the State.

THE STATE v. MORGAN.

FUGITIVE FROM JUSTICE.—*Appeal.*—No appeal by the State to the Supreme Court lies from the ruling of a judge discharging from arrest a prisoner brought before him for examination as provided by the act of March 9th, 1867 (Acts 1867, p. 126), "to regulate the arrest and surrender of fugitives from justice from other states and territories."

APPEAL from the Judge of the Cass Common Pleas.

RAY, J.—Under a warrant issued by the Governor of this State, upon the requisition of the Governor of the State of New York, Morgan was taken before the judge of the Court of Common Pleas of Cass County, for examination as provided by the act of March 9th, 1867, p. 126, "to regulate the arrest and surrender of fugitives from justice from other states and territories." The appellee was discharged from arrest by the judge. The State brings the case here

upon appeal; but the act makes no provision for a review in this court, and we must, therefore, on the motion of the appellee, dismiss the appeal.

There is nothing in the claim by appellant, that the act authorizing the State to reserve a question in a criminal action includes this case. 2 G. & H. 425, secs. 149, 150. This is neither a trial upon a criminal charge nor a proceeding embraced under the title of "criminal pleading and practice." The appeal in the case of *Robinson v. Flanders*, 29 Ind. 10, was from the ruling of the judge of the circuit court upon a writ of *habeas corpus*. Appeal dismissed.

GREGORY, J., expresses no opinion.

J. Q. Stratton, J. M. Pratt, McConnell & Winfield, Turpie & Baldwin, and D. E. Williamson, Attorney General, for the State.

D. D. Pratt, for appellee.

THE STATE v. BUXTON.

CRIMINAL LAW.—*Justice of the Peace.—Obstructing Highway.—Affidavit.*—

Prosecution before a justice of the peace for obstructing a highway. The affidavit charged, "that on or about, &c., at the said county of Jefferson, in the State of Indiana, one A. did unlawfully obstruct a highway then and there situate, being the highway running nearly north and south through section nine, town three, range eight east, from the Scaffold Lick and Kent road to the Lexington and Paris road, in said county and State, by then and there unlawfully erecting fences across said highway, as affiant is informed and believed."

Held, that the highway was sufficiently described.

Held, also, that it was enough to charge that the obstruction was within the jurisdiction of the court, and not necessary to state the particular place where it was erected on the road.

Held, also, that the fact that the charge was made on information and belief did not render the affidavit defective.

31	67
139	81

31	67
1169	125

31	67
171	667

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Held, also, that the mistake of the draftsman in writing "believed," instead of *believes*, was immaterial.

APPEAL from the Jefferson Common Pleas.

GREGORY, J.—This was a prosecution commenced before a justice of the peace for obstructing a highway.

The affidavit charges, "that on or about the 15th day of August, 1868, at the said county of Jefferson, in the State of Indiana, one James B. Buxton did unlawfully obstruct a highway, then and there situate, being the highway running nearly north and south through section nine, town three, range eight east, from the Scaffold Lick and Kent road to the Lexington and Paris road, in said county and State, by then and there unlawfully erecting fences across said highway, as affiant is informed and believed."

The court below, on motion of the defendant, quashed the affidavit and dismissed the case. The State appeals.

It is claimed, that the affidavit is defective in three particulars: first, that the road is not sufficiently described; second, that the particular place on the road where the obstruction was erected ought to have been stated; and lastly, that the charge is made on information and belief.

There is nothing in these objections.

The road is described in its beginning, terminus, and course; this is sufficient.

It was enough to charge that the obstruction was within the jurisdiction of the court.

The form given in the statute is this: "A— B— swears (or affirms) that on or about the — day of — 18—, at said county, C— D—, as *affiant verily believes* (here state the offense)." 2 G. & H. 642, sec. 31. It is claimed, that this belief must be founded on personal knowledge of the facts. If such had been the intention of the legislature, the words "as affiant verily believes" ought to have been omitted.

It frequently occurs that the perpetrator of crime is convicted on the testimony of a number of witnesses swearing to different parts of the transaction constituting the body of the offense. No one person could swear on personal

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knowledge that the accused was guilty, and yet any one of the numerous witnesses might with a clear conscience have made the affidavit for the arrest.

Some objection is made to the affidavit on the ground that the word "believed" is in the past tense, but this was evidently a mistake in the draftsman. The affidavit itself shows that the affiant was speaking as to his then present belief.

Judgment reversed, with costs; cause remanded, with direction to overrule the motion to quash the affidavit.

D. E. Williamson, Attorney General, and *E. R. & J. L. Wilson*, for the State.

H. W. Harrington and *C. A. Korbly*, for appellee.

LOUDEN, Administrator, v. JAMES and Others.

DESCENT.—*Surviving Second Wife without Children*.—Where a man dies, leaving surviving him a widow, a second or other subsequent wife by whom he has no children, and children by a previous wife, the widow, *as against creditors*, takes the same share of his real estate, by descent, in fee simple, as if a first wife; and at her death this fee simple descends to her said husband's children free from the demands of his creditors.

APPEAL from the Posey Common Pleas.

FRAZER, J.—Enoch R. James died, intestate, seized of real estate, leaving surviving him a widow, a second wife, by whom he had no children, and also children and the descendants of children by a previous marriage. Partition was made of his real estate, and a portion was set off to the widow. She has since died, and now the administrator *de bonis non* applies for an order to sell the land so set apart to the widow, to make assets to pay debts of the intestate.

These facts appearing by the complaint, a demurrer there-

31	69
134	187
81	69
154	428

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to for want of sufficient facts was sustained, and upon that ruling error is assigned here.

As between a widow, a second wife, having no children, and the children of the intestate by a previous marriage, it was held by this court as early as 1858, that under the statute of decents of 1852 (1 G. & H. 291, *et seq.*), the widow took only an estate for life. *Martindale v. Martindale*, 10 Ind. 566. This was followed shortly afterwards, in the same year, in *Ogle v. Stoops*, 11 Ind. 380. Seven years later the same question was here again, the judges of this court having, in the meantime, been wholly changed; and if the question could properly have been considered an open one, it is not certain that it would have been decided the same way. But it was deemed that the repose of titles acquired during so considerable a period upon the faith of the former decisions, together with the legislative assent to the law as thus interpreted, required that those decisions should be followed. *Rockhill v. Nelson*, 24 Ind. 422.

But the question now here is altogether different. It is not, what does the widow take as against children of the intestate? but it is, what does she take as against his creditors? The statute answers this question so plainly and expressly that there seems to be no room for construction. "If a husband die testate, or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, *free from all demands of creditors.*" 1 G. & H. 294, sec. 17. And then the language of the proviso to the twenty-fourth section is equally plain, that this fee simple which, as against creditors, the second wife without children takes on the death of the husband, "shall at her death descend to his children." Language so plain cannot be disregarded. That construction which attempts to make words mean what they plainly do not import, is but another name for a judicial invasion of that domain in the government of the state which the constitution has, in the clearest terms, confided exclusively to the legislative department. That it was intended by the statute to put beyond the reach of general

creditors one-third in fee simple of the real estate (not exceeding ten thousand dollars) of a decedent leaving a surviving widow, can hardly be a debatable proposition. That of this third the childless second wife took only an estate for life as against children of a former marriage, was a conclusion deduced altogether from the provision that upon her death that land should go the children of the deceased husband. The further conclusion, now sought to be drawn, that upon the death of the wife it shall be liable to sale for the payment of the husband's debts, does not follow—indeed, it is utterly inadmissible, and would be in palpable violation of the express words of the statute.

It is not attempted to reconcile the present decision with the broad language contained in the opinions delivered in *Martindale v. Martindale* and *Ogle v. Stoops*, *supra*. Those cases are simply deemed to settle the very question then before the court, and nothing beyond. We are not aware that it has heretofore been supposed that they would justify the inference that on the descent being cast upon the children by the wife's death the land would be brought within the reach of the husband's creditors. The present case is, so far as we are aware, the first attempt to enforce that theory in any of our courts. Moreover, if after the wife's death the land may be made assets by the husband's administrator, there is no reason why it may not be done during her life by selling the property subject to her estate for life. If the children take by inheritance from the husband, and not from the wife, this result would probably be inevitable. Note, then, the fruits of statutory construction! The sixteenth section expressly abolishes dower, and the seventeenth, as against creditors, gives the widow, in a case like this, an estate in fee simple, to go on her death to the husband's children—and this would be interpreted to mean that the widow takes an estate in dower only, against anybody, whether child or creditor. Does the judicial function of construction go to the extent of overriding the plain language and equally plain intention of the legislature?

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The case before us was probably suggested by what appeared to be a great hardship. The decedent died insolvent, seized of considerable landed estates. Of this, a quantity worth ten thousand dollars was set apart to the widow, and by her death it goes to his children. There seems to be a large measure of common justice in the claim that this land should now be converted into assets to be applied upon the decedent's indebtedness. This is the more striking because the aggregate value of this real estate is large. But if the widow had been the first instead of a second wife, the justice of the appeal would have been not less forcible than now. And yet in that case the statute would have presented an insurmountable obstacle to the demand. In that case the statute proceeds upon the assurance that maternal affection will not divert the estate from the children of the marriage; in this case the statute does not rely upon a childless step-mother's sense of duty, but fixes the course which the estate shall take upon her death. It secures to the creditors no advantage from the fact that the last marriage happens not to produce offspring; and why should it?

Judgment affirmed, with costs.

ELLIOTT, C. J., dissented.

J. and H. C. Pitcher, for appellant.

A. Iglehart and W. Harrow, for appellees.

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CRIMINAL LAW.—*Indictment*.—Where a statute in a criminal case is not to be taken in the broad meaning of the words used, but to be limited by construction to a special subject or matter, it is proper that an indictment thereunder should not charge the crime in the language of the statute simply, but should limit the case and bring it within the construction placed upon the statute.

31	72
149	277
31	72
161	687

31	72
167	418

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SAME.—Trespass to Land.—An indictment, under section 14, 2 G. & H. 462, for removing a quantity of valuable gravel from the land of another, should show the property removed to have been a part of the realty.

SAME.—Construction of Statute.—Words.—The words "remove from" in this section have not a technical meaning authorizing, in such a case, the implying of an averment that the thing removed was a part of the realty.

APPEAL from the Marion Criminal Circuit Court.

RAY, J.—This was an indictment for trespass to lands. The indictment alleged, that the defendant did, on, &c., unlawfully take and remove from the land belonging to Deborah Bacon, in the county of Marion, forty-five cubic yards of gravel, of the value of six dollars.

A motion to quash was overruled.

The statute provides, that any person, who shall cut down or remove from any land belonging to another, without license so to do from competent authority, "any tree, stone, timber, or other valuable article, shall be deemed guilty of a trespass, and upon conviction shall be fined in five times the value of such property, to which may be added imprisonment." 2 G. & H. 462.

This language is certainly broad enough to cover the removal of personal property from the land of another, and yet such an act has never been treated in any state as a misdemeanor, unless it was taken under such circumstances as would render the act a larceny. It is no more a misdemeanor to remove personal property from the land of another than from any other place. It is the taking that the law regards as the crime, if felonious, not the trespass, unless the thing taken be part of the realty, when it is punished, even without the criminal intent to retain the thing removed. Such statutes have always been held to apply only where the removal was of something forming part of the realty, and which would pass as such upon a sale of the premises.

Now, where a statute in a criminal case is not to be taken in the broad meaning of the words used, but limited by construction to a special subject or matter, it is proper that

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an indictment should charge the crime, not in the language of the statute simply, but limit the case and bring it within the construction placed upon the act. The law may be construed according to the evident intent and purpose of the legislature, but an indictment cannot be thus modified.

Nor have the words "remove from" any technical meaning authorizing us to imply an averment that the thing removed was a part of the realty. The same form is used in regard to the removal of the body of a person deceased from a burying ground, or forcibly taking goods from the person.

It was therefore necessary, in the opinion of a majority of the court, that the indictment in this case should have shown the property removed to have been a part of the realty. It may have been a pile of gravel hauled from other lands and placed there for sale; and if so, it would have simply been regarded as personal property, and there would have been no offense, under the statute cited, in its removal, any more than in the removal of a wagon from the land. An averment that the gravel was in place, or constituted a part of the land, would have avoided this objection.

The motion to quash should have been sustained.

On the trial, there was an agreement as to the facts, but no statement is made by which we can determine whether the gravel was personal property or a part of the realty. The statement of facts shows that a gravel road was being built upon this land, and, for aught that appears, the gravel may have been brought upon the land for the very purpose of a sale to the gravel road company, of which the defendant was president.

There was no argument for the State.

Judgment reversed, and cause remanded, with directions to sustain the motion to quash.

ELLIOTT, C. J.—I cannot concur in the opinion of my brother judges in holding the indictment in this case bad, and will state briefly the grounds of my dissent.

It is a general rule in criminal pleadings, which has been too often recognized by this court to require a reference to the cases, that where the particular act or acts constituting the offense are clearly defined by the statute, it is sufficient to charge the offense in the language of the statute. Here the statute declares, that any person "who shall cut down or remove" from any land belonging to another, without license so to do from competent authority, "any tree, stone, timber, or other valuable article, shall be deemed guilty of a trespass," &c., and the indictment alleges, that the defendant did, on, &c., "unlawfully take and remove from the land of Deborah Bacon, in the county of Marion, forty-five cubic yards of gravel, of the value of six dollars," &c. The offense is clearly defined by the statute, and is charged in the indictment in the same language.

But it is said, that it was not intended to make the removal of every species of personal property, without the consent of the owner, a criminal offense; nor do I claim for the statute so broad a construction. It prohibits the removal from the land, of any tree, stone, timber, or other valuable article. This language evidently requires that the article removed should, in some sense, pertain to the land itself, and hence would not include a wagon or other manufactured article, or live stock. The article removed must pertain to, and be removed from, the land, to bring the case within the purview of the statute.

If this is the proper construction of the words "remove from the land," as used in the statute, then the same language, when used in the indictment, and in reference to the same thing, is entitled to precisely the same construction. Gravel is an article pertaining to land, and ordinarily forms a part of it, and an allegation that it is taken from the land necessarily implies a severance. This being the reasonable and fair construction of the language of the indictment, to have limited that language by further averment would have been unnecessary.

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In my judgment, the indictment is good, and the motion to quash was properly overruled.

M. M. Ray, J. W. Gordon, and W. March, for appellant.

D. E. Williamson, Attorney General, for the State.

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131 276

THE STATE, on the relation of McCARTY, Auditor of State,
v. PEPPER and Others.

ESTOPPEL IN PAIS.—Where an act is done or a statement made by a person, which cannot be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere evidence; the estoppel being limited within such bounds as are sufficient to put those who have dealt on the faith of appearances that turn out to be incorrect in the same position with reference to the author of such appearances as if they were true.

SAME.—Principal and Surety.—Bond.—When a bond has been signed and delivered to the principal obligor by a surety, upon the condition that others, not named in the instrument, shall sign before it is delivered to the obligee, and it is delivered without such signatures being obtained, and received by the obligee without notice of such condition or circumstances which should put him upon inquiry, the condition imposed will not avail the surety. This is not a question of the power of the principal to deliver the bond in its apparently perfect condition, but simply a question of estoppel.

SAME.—Blanks.—A surety signing and delivering to the principal obligor a bond before the names of the sureties have been inserted in the body of the instrument will be held as agreeing that the blank for such names may be filled after he has executed it.

SAME.—Signing after Forged Signature.—A surety signed a county treasurer's official bond, at the request of the principal obligor, after the signatures of other sureties, without reading it, or hearing it read, or asking what it was, upon being told by the principal that it was a county paper.

Held, that such surety was not released by the fact that one of the signatures before his was forged.

AGENCY.—Official Bond.—The principal obligor in a county treasurer's official bond is not the agent of the board of county commissioners in procuring its execution.

APPEAL from the Franklin Circuit Court.

The State, *ex rel.* McCarty, Auditor of State, *v.* Pepper and Others.

RAY, J.—This was an action upon the official bond of Michael Batzner, Treasurer of Franklin county, for a failure to pay over money collected for the State as such treasurer.

There was an answer in five paragraphs.

The first is a general *non est factum*, putting in issue the execution and delivery of the bond.

The second sets up the fact of the supposed bond being intrusted to a special agent for the special purpose only of delivering this supposed bond when certain conditions should be complied with; and that he fraudulently handed the supposed bond over to the obligee without authority.

There is a third issue of fact, that after the supposed bond had been delivered to the obligee there were material alterations made in it, without the knowledge or consent of the obligors, which avoided the bond.

There is a fourth issue upon the plea of those who signed after the bond was delivered to the obligee, that they were induced to sign and deliver it by fraud; that they would not have signed or delivered it if they had known that it had before been delivered; and that their signing made a material alteration in it, unknown to them, after delivery.

The fifth issue of fact is, that when the bond was delivered by the obligors, they all, except Batzner and Grinkemeyer, supposed that the signatures of all the obligors who purported to have signed it were genuine; and if they had known that any of the signatures were forged, they would not have delivered the bond; whereas, in fact, one of the signatures, that of Grinkemeyer, was not genuine, but a forgery.

The cause was submitted to the court for trial, and there was a finding for the defendants.

The appellees make the following abstract of the main part of the evidence.

Grinkemeyer testifies as follows: "That he did not sign the bond, or authorize any one to do it for him." (Judg-

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ment has been rendered in his favor upon the ground that his signature was a forgery.)

Clark.—"Batzner wanted me to sign the bond. I told him he knew that I was embarrassed, and could do him no good. He said he wanted to get one hundred names on the bond, and my name might induce others to sign it. I was at the time insolvent."

Pepper.—"Batzner asked me to sign his bond, and said he must or would have one hundred names on it. Can not say which. I put my name there because he said he must or would have one hundred names on it."

Koerner.—"Batzner asked me to sign my name to his bond. He said I need not be afraid, he wanted to get the whole county on it, and then I signed my name. I signed the bond because I thought if he got so many on it there could be no danger."

Schmidt.—"Batzner asked me to sign his bond. I told him I did not know about it. He asked me why. I said he might get a big pile of money on hand and run away and leave us to pay it. He said I need not be afraid, that he intended to get one hundred good names on it. I saw Fiske sign it; and I then signed it."

Ottel.—"Batzner asked me to sign my name. I told him that it was of no use, that I had no property. He said that made no difference, that it was just for fun. He said that so the paper was full it was right. I did not read it, nor did he read it to me. I thought I was just signing for the character of the man. I can not read English. He did not tell me what it was for; I supposed it was for the character of the man. I had no property at the time."

Walter.—"Batzner brought the paper to me; I hesitated; he said I need not be afraid, he intended to get one hundred good names on it."

Shroeder.—"Batzner handed me the paper, and asked me to sign it. I told him I did not like to sign it. He said he had to have one hundred good names on it, and on this consideration I signed it."

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Calfee.—"Batzner asked me to sign his bond. I told him I had always avoided such matters. He spoke of our acquaintance, &c., and said if I would put my name down he would get one hundred good names to go on the bond, and spoke about the township he intended to get them in. I then put my name down with these inducements."

Quick.—"Batzner asked me to sign his bond. I told him he could get enough without me. He said he intended to get one hundred names before he presented it to the Board."

Witt.—"Have lived in this county twenty-three years. Knew Batzner. I signed the bond at my house; Batzner brought a paper to me; I didn't ask what it was, but signed it; didn't read it; Batzner said, Here, Witt, is a county paper, sign it. I didn't ask him what it was, but signed it; he didn't read it to me."

Martin.—"Batzner asked me to sign the paper. I asked him what it was for. He told me it was for his treasurer's bond. I hesitated; and he then told me I need have no fears, for he would have one hundred good men on it before he attempted to file it."

Alther.—"Batzner told me he wanted me to sign the bond. I told him to get richer men, I was too poor to go on a bond for so much money. He said I ought not to be afraid, that there was one man on the bond that was worth fifty thousand dollars; that he would not get less than two hundred names on the bond, and on this consideration I signed the bond."

Johnson.—"Batzner asked me to sign the bond. I told him my name would do no good; he said he wanted to get one hundred names on the bond."

Moorman.—"Was sheriff, &c. Saw the bond the day the commissioners met. They met in the auditors's office. There was no court in session. There was a blank in the body of the bond—no names except Batzner's, nor any date to it. The blank was filled up after it was approved, by Archy Herndon, by the insertion of the names of the sureties."

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Buckingham.—"Batzner asked me if Mr. D. D. Jones had seen me about his surety bond. I told him he had. I asked him if Mr. Jones and Dr. George Berry had signed it. He said they had not, but were going to; that he had been to see Dr. Berry, and he had promised to come and sign the bond; * * * that he intended to get one hundred names, the best men in the county. I then signed the bond. * * * I asked if Dr. Berry and Dan Jones were certain to go on the bond. He said they were. I was induced to sign the bond by these statements, and knowing that Jones and Berry were leading men in the county and were well acquainted. * * * My understanding was, that he, Batzner, was to get the names before the commissioners met, and the bond was then to go to the commissioners."

Berry.—"Batzner asked me to sign the bond. I asked him if he had redeemed his pledge he had made as to the number of men to be on the bond, which was, that he should have one hundred good men on the bond. He said he had not, but would get them. I told him to get ninety-nine, and I would be the hundredth. I did not then sign the bond. The day I signed it he came to me * * and pressed my signing it. I asked him if he had got the names, and he said he had not, but intended to get them. I told him that was his pledge, and I did not want to go on until he had got them. He said he wanted to get some names in the country, and did not want to go to get them until he had got the names of his acquaintances in town. I told him I would sign with the understanding that I was to be on if there were one hundred good names on the bond. I signed it and left it with him with that understanding. I left it with him, to be delivered when he got one hundred good men on it."

Shafer.—"Batzner came back with a paper in his hand, and asked me if I did not want to sign it. I asked him, 'For what?' He said he wanted one hundred men on it for rec-

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ommendation. He said, 'You must not be afraid to sign your name.' I said, if it was nothing else but a recommendation, I would do it. I did not read it; it was folded up. I saw nothing written or printed on it. He did not read it to me. I can't read English. I did not ask him to read it to me; did not know it was a bond; saw no names on it; would not have signed it had I known it was a bond. He did not speak of any other paper, or names to a paper, until after I had signed it. During that evening he told me he had a bond filled out at Brookville, with sixty names on it."

Stoops.—"I was one of the commissioners at the time this bond was approved, and was in attendance. It was a special meeting, called to approve the bonds. When it was first presented, I objected that there were not names enough on it. Batzner took it out and got King, West, and others to sign it. Don't recollect whether Grinkemeyer's name was on when he brought it back, or not; can't say whether it had been filled up with names and dates at the time he brought it back, or not."

Hyatt.—"I was commissioner when this bond was approved, and was present when first presented; it was rejected, only a portion of these names being on it; the balance of signatures were procured the same day, and within a short time. Think that after it was objected to, all the names from Johnson down were put on it. Grinkemeyer's name was brought in; it had not been on before. Don't know whether it was filled up before approval, or not. When first presented, the bond was objected to. Batzner took it out and got on the name of Johnson and those below it."

The question presented in this court is upon the sufficiency of the evidence to sustain the finding.

In the case of *Deardorff v. Foresman*, 24 Ind. 481, the question presented in this case upon the liability of the sureties where the bond was delivered by them to the principal upon condition that others, not named in the bond, should sign before the bond was delivered to the obligee,

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and such delivery was made without such signatures being obtained, and the bond received by the obligee in good faith, was examined; and it was held, that where "the surety places the instrument, perfect upon its face, in the hands of the proper person to pass it to the obligee, the law justly holds that the apparent authority with which the surety has clothed him shall be regarded as the real authority; and as the condition imposed upon the delivery was unknown to the obligee, therefore the benefit of such condition shall not avail the surety." This decision was affirmed in *Webb v. Baird*, 27 Ind. 368, and in *Blackwell v. The State*, 26 Ind. 204, where it was also held, that the principal obligor was not the agent of the board of commissioners.

This entirely disposes of the plea of a special agency. The special agent is clothed with the apparent authority to make an unconditional delivery of the bond, and the obligee, uninformed of the condition imposed, is authorized to receive the bond thus delivered. Nothing short of absolute notice to the obligee, or circumstances which should put him upon inquiry and therefore imply notice, can avoid this rule. It is not, as stated in *The People v. Bostwick*, 32 N. Y. 445, a question of the power of the principal to deliver the bond in its apparently perfect condition, but simply a question of estoppel. The surety signs an instrument complete on its face, and delivers it to the principal to pass over to the obligee; if he impose any condition upon his delivery, he must rely upon the principal to execute that condition, for he has made him his agent for the general purpose of a delivery, and has clothed him with the *indicia* of such agency. The obligee accepts an instrument perfect in form and execution, which comes to him from the person who should have possession of the instrument for the purpose of such delivery. The entire transaction, so far as the obligee is involved, is according to the ordinary and natural course. The surety, however, while he executes the instrument and places it in the usual channel for delivery, departs from the ordinary course of procedure by circum-

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scribing the general authority by a condition unknown to the obligee. The condition is disregarded, a fraud is accomplished, and he who has not scrupled to trust his principal with the semblance of a general authority to make the delivery must stand the hazard he has incurred.

A much broader scope has been given to the doctrine of estoppels *in pais*, both in this country and in England, than formerly obtained, and it is now established, that whenever an act is done or a statement made by a party, which cannot be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere evidence. The estoppel must obviously be limited within such bounds as are sufficient to put the party who has dealt on the faith of appearances that turn out to be incorrect in the same position with reference to the author of such appearances as if they were true. The truth is, courts have been, for some time, favorable to the utility of the doctrine of estoppels, hostile to its technicality. 2 Smith Lead. Cas. 619 (8th Am. ed.); *Smith v. Newton*, 38 Ill. 230; *Knoebel v. Kircher*, 33 Ill. 308.

It is intimated by Judge REDFIELD, in a note to the case of *The York Co. M. F. Ins. Co. v. Brooks*, 3 Am. Law Reg. (N. S.) 403, that the English courts have denied the application of the rule to this class of cases, that he who by his culpably negligent act enables his agent to commit a fraud to the prejudice of third persons, is estopped from denying the actual authority of the agent; and the cases of *Swan v. The North British, &c., Co.*, 10 Jur. (N. S.) 102, and *Patching v. Dubbins*, 23 Eng. L. & Eq. 609, are cited as authority for the remark. In the case of *Deardorff v. Foresman*, *supra*, we examined the first case cited, and the result proved that his conclusion was not sustained by that authority. The case of *Patching v. Dubbins* was where a vendor of land covenanted, that no building except tombs should be erected on any part of his land opposite to the land sold. Subsequently the vendor sold part of the land

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on the other side of the road, and the purchaser built thereon. No objection was made to the building erected, as it did not intercept the view of the first vendee. Subsequently another part of the land was sold, and buildings were about to be erected, when the original purchaser filed a bill to enjoin the building; but the court dismissed the bill, holding that the true meaning of the covenant was, that it extended only to so much of the lands of the original vendor as were exactly opposite to the land sold to the plaintiff. If this decision is a denial of the application made in this country of the rule referred to, the English Court of Appeal in Chancery has evinced so much delicate consideration for the American courts that its line of departure from their rulings cannot be traced.

But since the decision of this court in the *Deardorff* case, the question there considered has been before the Supreme Court of the State of Maine, and has received a like solution. *State v. Peck*, 53 Me. 284. This decision, published the year following the case in this court, reviewing, as it does, the same line of authorities, supporting itself by the same decisions and arguments that approved themselves to us, renders it unnecessary that we should do more than quote the result reached: "A bond perfect upon its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed, and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, and also that he has been induced upon the faith of such bond to act to his own prejudice."

Before passing from this portion of the case it may be well to add a remark to our comments made in the *Deardorff* case upon the decision in the Supreme Court of the United

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States in *Pawling v. The United States*, 4 Oranch, 218. The action was upon an official bond given by Ballinger and signed by Pawling, Todd, Adair, and Kennedy, as his sureties, who pleaded that they delivered the same as an *escrow* to one Joseph Ballinger to be safely kept, upon condition that if Simon Ingleman and William Patton, *named on the face of the bond*, should execute the same as co-sureties, then the bond should be delivered to the agent of the United States; otherwise not. There was an issue upon this averment of a delivery as an *escrow*, and the question was presented to the court upon a demurrer to the evidence introduced by the defendants. Without commenting upon the allegation, that an instrument not fully executed was delivered as an *escrow*, we cite a paragraph from the opinion of Chief Justice MARSHALL: "It is also of some importance that the defendant Todd had previously declared that he should not be apprehensive of becoming a security for Ballinger, provided others, whom he named, should also become securities, and that he inserted the names of others in the bond, in the presence of the witness."

When it is considered that this is the original decision upon which all the cases rest that assume to release the surety from liability when the name of his co-surety does not appear on the face of the instrument, the entire want of authority to justify their departure from sound principle can be appreciated.

The evidence in the case in judgment did not authorize the finding that the sureties were released because others did not sign the bond as co-sureties.

There remain but two questions. Of these, there can be nothing predicated on the fact that the bond was not accepted upon its first presentation to the board of commissioners. No formal action was taken by the board at that time, but it remained in session to act upon the bond when presented, and the names of the sureties were left blank in the body of the instrument for the very purpose of procuring names sufficient to satisfy the board. A party signing

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and delivering an instrument in this condition must be held as agreeing that the blanks may be thus filled after he has executed it; and the evidence introduced shows full authority given to the principal to procure such signatures as he secured. *Inhabitants of South Berwick v. Huntress*, 53 Me. 89; *Smith v. Crooker*, 5 Mass. 538; *Hudson v. Revett*, 5 Bing. 368; *Eagleton v. Gutteridge*, 11 M. & W. 465.

The rule as stated in 1 White & T. Leal. Cas., 157, in the note to *Dering v. Earl of Winchelsea*, is, that "where a note with the names of certain persons upon it, who stood in the relation of co-sureties for the maker, has been offered for discount, and not being satisfactory, the name of another person has been procured, who also becomes a surety for the maker, all these persons are co-sureties with one another, and subject to mutual contribution, though the earliest sureties had no knowledge of the last's becoming a surety." The cases fully sustain this doctrine. *Stout v. Vause*, 1 Rob. (Va.) 169; *Warner v. Price*, 3 Wend. 397; *Norton v. Coons*, 3 Denio, 130; S. C. 2 Seld. 33; *Woodworth v. Bowers*, 5 Ind. 277; *Sisson v. Barrett*, 6 Barb. 199; S. C. 2 Comst. 406; *M'Neil v. Sanford*, 3. B. Mon. 11.

The cases of *Oneale v. Long*, 4 Cranch 60, and *Harper v. The State*, 7 Blackf. 61, if to be sustained, must rest on the fact that a perfect instrument had been delivered by the original sureties, fully executed and filled up, and that the names of other sureties were afterward inserted in the body of the instrument without the consent of such original sureties, in disregard of the technical rule at common law concerning the alteration of sealed instruments. Here the space was left blank for the very purpose of inserting the names of all who might sign the bond, and this common law restriction does not exist under our statute.

The name of Grinkemeyer, however, was forged to the bond; but this was the last name signed, except that of Witt; and as the signatures preceeding that of Grinkemeyer were in no way procured by the forger, they cannot be re-

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leased thereby. The supreme confidence evinced by Witt in "county papers" will relieve him from any suspicion of having been influenced to sign by any preceding names. Indeed, there are cases which would hold him as affirming the genuineness of the preceding signatures. *York Co. M. F. Ins. Co. v. Brooks*, *supra*; *Terry v. Hazlewood*, 1 Duvall, 104.

The former decision in this case, in 22 Ind. 399, is overruled, for the reasons given in *Deardorff v. Foresman*, *Blackwell v. The State*, *Webb v. Baird*, *supra*, and by the decision herein. It should have been regarded by our courts as overruled by the first two cases cited.

The judgment is reversed, with costs, and the cause remanded for a new trial.

ON PETITION FOR REHEARING.

FRAZER, J.—In considering the application for a rehearing, we have not thought it necessary or useful to re-examine the doctrine declared in the original opinion, and in the former case of *Deardorff v. Foresman*. That subject had been examined by all the judges in consultation, to the extent of a critical inspection (to a considerable extent repeated) of the cases cited, and of those referred to by all other courts as supporting the ruling of this court in this cause when formerly here. The result has been, not only a clear conviction on the part of the whole bench, as expressed in the opinions in this and the *Deardorff* case, but also a wonder how, upon a thorough examination of the subject, any other conclusion could be arrived at.

A suggestion in the petition for rehearing seems to call for notice. It is, that the estoppel was not pleaded. But it could not properly be pleaded. The answers were mere denials, direct or argumentative, of the execution of the bond, and no reply was necessary or proper. The estoppel could not be pleaded, and might properly go in evi-

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dence. Indeed, the facts creating it were put in evidence by the appellees themselves.

Petition overruled.

G. Holland and C. C. Binkley, for appellant.

L. Barbour, J. D. Howland, and H. C. Hanna, for appellees.

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124	306

 BIRDG v. THE STATE.

CRIMINAL LAW.—*Forgery.—Indictment.*—An indictment for defacing and destroying a promissory note, in which it is alleged, as an excuse for not setting forth the *tenor* of the note, that it was destroyed by the defendant, must state its substance and effect.

SAME.—An indictment for defacing and destroying a promissory note must show whether the note was for the payment of money or property.

APPEAL from the Adams Circuit Court.

GREGORY, J.—Birdg was indicted in the court below for forgery.

The indictment contained four counts. The court, on motion, quashed the first, and overruled the motion of the appellant to quash each of the others.

The indictment is bad; and the court erred in overruling the motion to quash.

The charge is for defacing and destroying a promissory note.

The second and third counts do not allege who was either the maker or payee, nor is the sum for which the note was given stated. It is averred that it was of the value of nine dollars. In each of these counts, it is alleged, that the “grand jury cannot set forth in this indictment the *tenor* of said promissory note, because it was entirely destroyed by said unlawful act of James Birdg.”

The fourth count states the names of the maker and payee, but fails to show the sum for which the note was given, nor does it show whether the note was for the payment of money or property.

In *Wallace v. The People*, 27 Ill. 45, it was averred, that the date and substance of the forged instrument was unknown to the jurors, and that it was lost, yet the court held the indictment bad, for not alleging the substance and effect of the instrument.

The rule as laid down by Wharton requires this. Am. Crim. Law, §§ 311, 608.

The language of the statute is, that "every person who shall falsely make, deface, destroy, alter, forge, or counterfeit * * * any * * * promissory note for the payment of money or property, * * * with intent to defraud any person, * * * shall be deemed guilty of forgery." 2 G. & H. 446, sec. 30.

The fourth count is bad for failing to show whether the note was for the payment of money or property.

Judgment reversed, and cause remanded, with directions to sustain the motion to quash.

D. Studabaker, for appellant.

D. E. Williamson, Attorney General, for the State.

Simpson v. The State.

SIMPSON v. THE STATE.

WITNESS.—Child under Ten Years.—Competency.—Examination.—Where the competency of a child under ten years of age as a witness is challenged, the decision of the court must be founded on the judge's own opinion derived exclusively from an examination made by him in public as a part of the trial.

SAME.—Criminal Law.—New Trial.—On the trial of an indictment for a rape, the prosecuting witness was a child only six years old at the time of the trial, sixteen months after the alleged offense. The competency of the witness being challenged, the court examined her, and, not being satisfied, appointed two gentlemen who retired with the child to a private room, and, after some time, returned and reported to the court, that, "in their opinion, her testimony ought to be heard, but received with great allowance;" whereupon she was allowed to testify over the defendant's objection.

Held, that for this action of the court the defendant was entitled to a new trial.

Held, also, that the court should have acted on its own judgment, upon a public examination when the defendant was present.

Held, also, that courts should be very cautious in admitting as witnesses children of such tender years.

APPEAL from the Greene Circuit Court.

FRAZER, J.—This was an indictment for a rape. There was a conviction upon a plea of not guilty. The only error assigned is the overruling of a motion for a new trial. The prosecuting witness was a child only six years old at the time of the trial. The offense charged occurred some sixteen months before. The competency of the witness being challenged, the court examined her, and, not being satisfied, appointed two gentlemen who retired with the child to a private room, and, after some time, returned and reported to the court, that, "in their opinion, her testimony ought to be heard, but received with great allowance;" whereupon she was allowed to testify over the defendant's objection. This action cannot be sustained. The court should have acted on its own judgment upon a public examination when the defendant was present. *Prima facie*, the child was incompetent and could not testify. The court might, however, examine her, and upon such examination develop-

ing sufficient intelligence might, from the facts thus elicited, determine upon her competency and allow her to testify. 2 G. & H. 169, sec. 239. This determination is judicial; the examination is a part of the trial, must be public, and must be made by the court. The decision must be founded upon the opinion of the judge from the examination which he makes. It cannot be referred to somebody else to do this; nor can the judge be guided by the opinion of such referee; but he must act upon his own opinion.

In the case before us, the only fair interpretation of the record is, that the judge was not satisfied from his own examination that the witness was competent, and that his decision was therefore influenced, to some extent at least, by the opinion of those whom he had appointed to examine the child. That opinion should not have been taken, and should, when taken, have had no influence. If we could say that the court decided the question exclusively upon the facts elicited by its own examination, possibly we could not reverse the cause on account of its decision; for some members of the court would be in doubt, making allowance for the better opportunities of the judge below who had the child personally present and might justly gain impressions as to her intelligence, as well by her appearance and manners as by the words of her answers to him. But such was not the fact; and we must therefore order a new trial.

The interests of justice undoubtedly require that the courts should be very cautious in admitting as witnesses children of such tender years.

Judgment reversed, and new trial ordered.

E. E. Rose and *E. H. C. Cavins*, for appellant.

D. E. Williamson, Attorney General, for the State.

Kantrowitz and Another v. Prather and Wife.

KANTROWITZ and Another v. PRATHER and Wife.

MARRIED WOMAN.—*Separate Real Estate.*—*Contract.*—In this State, in order to enforce the contract of a married woman against her separate real estate, her intent to deal with the property must appear, and may not be assumed, and the contract must be one from which benefit results to the property.

SAME.—*Profits of Real Estate.*—So far as the profits of a married woman's real estate are concerned, effect will be given to her contract where she has indicated her purpose to deal with such profits.

SAME.—*Protecting Supervision of Chancery.*—It must appear that any contract relating to the property of a married woman, which it is sought to enforce in equity, is conscionable, and where it relates to the betterment of her real estate, that it is reasonably calculated to promote that end.

SAME.—*Intent.*—The fact that credit for goods sold to a married woman is given her upon the faith of her separate property, is not sufficient to create a charge against her land or its income; she must also herself intend to contract with regard to her separate estate.

APPEAL from the Bartholomew Common Pleas.

RAY, J.—Suit by the appellants against the appellees. The complaint is as follows: "The plaintiffs, Jacob Kantrowitz and Nathan Kantrowitz, partners, trading under the firm name and style of Kantrowitz & Co., complain of Hannah Prather, defendant herein, and say that said defendant is now, and has been continually for four years last past, the wife of her co-defendant, Allen W. Prather, who is also made party hereto; that said Hannah is now, and has been continually for the four years last past, seized in her own right and for her sole use and benefit, of lot No. 32, in Sims and Findley's addition to the city of Columbus, in said county, of the value of four thousand dollars; and that the said Hannah is indebted to plaintiffs in the sum of \$386.45, for necessary goods, wares, and merchandise sold and delivered by said plaintiffs, as said firm, to said defendant Hannah, at her special instance and request, a bill of particulars of which is filed herewith, and made part hereof. The said goods were sold and credit given to said Hannah on the faith of her said separate property, and not otherwise; the payment of which said indebtedness is a charge upon the separate

property of said Hannah. Said indebtedness is due and unpaid. The articles furnished by plaintiffs to defendant were articles suitable to a person in her station in life; and the credit was given to her exclusively, her husband having no property subject to execution at or during the time the articles were being furnished. Wherefore plaintiffs pray the court for a finding of the amount due from said wife to them, and a decree charging her said separate property with the payment thereof, with costs, and also a decree and order directing her said separate property to be sold to satisfy said finding and costs; or, if more consistent with equity, to order the rents thereof to be applied; and all other proper relief."

The bill of particulars filed with the complaint shows that the goods furnished the wife were mainly female wearing apparel.

The defendants demurred jointly and separately to the complaint:

1. That the court had no jurisdiction of the subject matter of the action.
2. The improper joinder of said Hannah and her said husband as defendants.
3. That the complaint did not state facts sufficient to constitute a cause of action.

The court below sustained the demurrers as to the third cause, and overruled them as to the first and second.

Final judgment on demurrer for the appellees.

The opinion of Lord ROMILLY, M. R., in the case of *Shattock v. Shattock*, Law R. 2, Eq. 182, states the rule in equity as to the power of a married woman to deal with reference to her separate estate, where there are no restrictions upon its alienation:—

"The principle of the courts of equity relating to this subject, in my opinion is, that, as regards her separate estate, a married woman is a *feme sole* and can act as such; but only so far as is consistent with the other principle, namely, that a married woman cannot enter into a contract. These principles are reconciled in this way. Equity attaches to the

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separate estate of the married woman a quality incidental to that property, viz., a capacity of being disposed of by her; in other words, it gives her a power of dealing with that property as she may think fit; but the power of disposition is confined to that property, and the property must be the subject matter that she deals with; and, therefore, if she makes a contract, the contract is nothing unless it has reference, directly or indirectly, to that property. This is, in my opinion, the extent of the doctrine of equity relating to the separate estate of a married woman. It is on this principle that every bond, promissory note, and promise to pay, given by a married woman, has, for the reason I have already stated, been held to be a charge made by her on her separate estate; that is to say, it is a disposal of so much of her property, the whole of which, if she pleased, she might give away. But if equity goes beyond this, it appears to me that it is laying down this principle, that where a married woman has separate estate she may bind herself by contract exactly as if a *feme sole*; or, in other words, that the possession of separate property takes away the distinction between a *feme covert* and a *feme sole*, and makes them equally able to contract debts. It is clear that this implication of a charge cannot exist in the mere case of simple contract debts without one word said or written to show that the separate property is to be bound." After reviewing the case of *Johnson v. Gallagher*, 30 L. J. (Ch.) 298, and the case of *Hulme v. Tenant*, 1 Bro. C. C. 16, and alluding to the fact that on the first occasion Lord THURLOW in *Hulme v. Tenant* stated as the proper rule, "that a *feme covert* acting with respect to her separate property is competent to act in all respects as if she were a *feme sole*," and that on the second occasion the reporter, Mr. Brown, was not present, but reports *ex relatione* and very shortly, and thus reporting, states Lord THURLOW as laying down the broad doctrine, "that the separate estates of married women are liable for their general engagements," though the decree rendered is not consistent with this broad doctrine; Lord ROMILLY then

proceeds, "I must, therefore, consider the case of *Hulme v. Tenant* as only an authority for the principle to the extent I have stated it, and that it is in this limited form only that it is confirmed by Sir WILLIAM GRANT in *Heatley v. Thomas*, 15 Ves. 596; that is, that the engagement need not be in writing, but if not in writing, it must be proved that it was entered into with an intention on the part of the married woman of making her separate estate liable to discharge that debt, and this intention will not be inferred from the mere circumstance of her contracting the debt. When I say that the engagement need not be in writing, of course there is this qualification, that if the separate property of the married woman consists of real estate only, the Statute of Fraud applies as in every case affecting land; but if she have an absolute interest in personalty settled to her separate use, then a verbal agreement that her personal estate shall be liable to pay the debt will bind it."

After examining the case of *Field v. Sowle*, 4 Russ. 112, and the anonymous case in 18 Vesey, 258, the proper name of which is *Bruere v. Pemberton*, and the cases of *Gregory v. Lockyer*, 6 Madd. 90, and *Vaughan v. Vanderstegen*, 2 Drew. 165, this conclusion is reached: "The result is that, in my opinion, the rule is, that the liability of the separate estate of a married woman is only created by something which operates as a specific charge upon it, and that this charge can be produced only by an intention on the part of the married woman to create such a charge. I adopt the expression of Sir JOHN LEACH, in *Stuart v. Kirkwall*, 3 Madd. 387, viz.: 'that a *feme covert* being incapable of contract, this court cannot subject her separate property to general demands. But that, as incident to the power of enjoyment of separate property, she has a power to appoint it, and that this court will consider a security executed by her as an appointment *pro tanto* of her separate estate.' The only alteration I would wish to make in this passage is, to strike out the words 'appoint' and 'appointment,' and put in 'dispose of' and 'disposal,' because it is clear, it is not an

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appointment; it is not intended as an appointment in any respect. It is quite certain it is not the execution of a power, and there is a constant discussion in the cases as to what it is. It is nothing more than this, that the married woman has certain property over which she has exactly the same power of disposition as if she were a *feme sole*, and, therefore, she may dispose of that property as she pleases; she does not 'appoint' it in the proper sense of the word; 'assign' would be much nearer; but it is, in point of fact, nothing more than a disposition. She disposes of the property, and equity enforces that."

In *Matthewman's Case*, Law R. 3 Eq. 781, this decision is approved, and it is held, that the separate estate of a married woman is bound by her debts, obligations, and engagements, contracted for herself upon the credit of that estate; and whether such obligations were so contracted must be judged of by the circumstances of each particular case.

These, the most recently reported decisions of the English courts upon this question, we think correctly state the rule as there recognized, in a case where no restriction is placed upon the power of alienation.

In the leading American case of *The Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. 77, where the English cases up to that time were fully reviewed by Chancellor KENT, he closes with this language: "I apprehend, we may conclude, (though I certainly do it with unfeigned diffidence, considering how great talents and learning, by a succession of distinguished men, have been exhausted on the subject) that the English decisions are so floating and contradictory, as to leave us the liberty of adopting the true principle of these settlements. Instead of holding that the wife is a *feme sole*, to all intents and purposes, as to her separate property, she ought only to be deemed a *feme sole, sub modo*, or to the extent of the power clearly given by the settlement. Instead of maintaining that she has an absolute power of disposition, unless specially restrained by the instrument, the

converse of the proposition would be more correct, that she has no power but what is specially given, and to be exercised only in the mode prescribed, if any such there be. Her incapacity is general; and the exception is to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of law. These very settlements are intended to protect her weakness against her husband's power, and her maintenance against his dissipation. It is a protection which this court allows her to assume, or her friends to give, and it ought not to be rendered illusory. The doctrine runs through all the cases, that the intention of the settlement is to govern, and that it must be collected from the terms of the instrument. When it says she may appoint by will, it does not mean that she may likewise appoint by deed; when it permits her to appoint by deed, it cannot mean, that giving a bond, or note, or parol promise, without reference to the property, or making a parol gift, is such an appointment. So, when it says that she is to receive from her trustee the income of her property, as it, from time to time, may grow due, it does not mean that she may, by anticipation, dispose at once of all that income. Such a latitude of construction is not only unauthorized by the terms, but it defeats the policy of the settlement, by withdrawing from the wife the protection it intended to give her. Perhaps we may say that if the instrument be silent as to the mode of exercising the power of appointment or disposition, it intended to leave it at large, to the discretion and necessities of the wife; and this is the most that can be inferred."

We have quoted fully from these well considered decisions, for the sufficient reason that upon this vexed question no inconsiderable confusion has resulted from cases having been ruled upon a misapprehension of the exact point decided or principle applied in some earlier decision. This error is avoided when the exact ruling is set out.

In the court of errors, this doctrine of Chancellor **KENT**:

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was modified so far as this: that a married woman would be regarded in a court of equity with respect to her separate estate as a *feme sole*, and may dispose of her estate as she pleases, if there be nothing in the deed of settlement requiring the consent or concurrence of her trustee, nor any negation of an unlimited power of disposition. In the later case of *Yale v. Dederer*, 22 N. Y. 450, it was held, that the instrument executed by a married woman must declare her intent to charge her separate estate, or the consideration received by her must go to the direct benefit of the estate. In *Manchester v. Sahler*, 47 Barb. 155, it was held, that a married woman cannot charge her separate estate for a debt which did not arise in connection with it, and which is not for the benefit of her estate or for her own benefit. In *Bal-lin v. Dillaye*, 37 N. Y. 35, it was held, she might contract on the credit or for the benefit of her estate.

In *Willard v. Eastham*, 15 Gray, 328, the rule is thus stated: "The true limitations upon the authority of a court of equity in relation to the subject are stated with great clearness and precision in the elaborate and well reasoned opinion of the Court of Appeals in New York in the case of *Yale v. Dederer*. And our conclusion is, that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. But where she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it."

The legislation on this subject in the different states very clearly indicates that the English rule has not been entirely satisfactory. Indeed, the remark of Judge STORY, "that this holding that a general security, executed by a married

woman, purporting only to create a personal demand and not referring to her separate property, shall be intended as *prima facie* an appointment or charge upon her separate property, is a strong case of constructive implication by courts of equity, founded more upon a desire to do justice than upon any satisfactory reasoning," seems to have called forth legislative action to control and limit this chancery power. Thus in the State of Maine a married woman may sell and convey her own property—may sue or be sued in relation to her rights, and this is not confined to her separate property. *Springer v. Berry*, 47 Me. 330.

In Kentucky it is held, under their revised code, that a married woman cannot charge or alienate her estate but by order of a court of equity, and then only for exchange or reinvestment. *Daniel v. Robinson*, 18 B. Mon. 301. Her estate cannot be sold for debts by her contracted, as that would be to enable her to do indirectly what the statute prohibits her doing. In this case the husband and wife had jointly signed the note. The object of the statute was to protect married women against their own improvidence. *Williamson v. Williamson*, 18 B. Mon. 329. The wife cannot now by joining in a deed with her husband convey her real estate. *Ib.* 386. The same question is decided in *Stacker v. Whitlock*, 3 Met. Ky. 244.

In New Jersey, where the wife's property is protected against her husband and his creditors, still, as the statute does not authorize her to convey, her conveyance is void, *Naylor v. Field*, 5 Dutcher, 287. In *Johnson v. Parker*, 3 Dutcher, 239, it was held, that the land of a married woman was not liable under the mechanic's lien law, for a building erected on the land under a contract with the husband, although the wife acquiesced and gave directions in relation thereto. The statute in that State requires a deed in order to convey or incumber.

It is held in Wisconsin, that a woman may charge her separate estate where she does so clearly, leaving the question open as to what circumstances in the absence of positive

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expressions would be deemed sufficient. *Heath v. Van Cott*, 9 Wis. 516. In *Conway v. Smith*, 13 Wis. 125, the majority of the court held, that under their statute the wife may give a note for materials furnished to improve her property, and that she may be sued at law—*COLE*, J. dissenting, claiming that the case of *Wooster v. Northrup*, 5 Wis. 245, was to the contrary. The statute provides, that a married woman may hold to her sole and separate use and convey and devise real and personal property and any interest and estate therein, and the rents, issues, and profits, in the same manner and with like effect as if she were unmarried. It was held in *Conway v. Smith*, *supra*, and in *Todd v. Lee*, 15 Wis. 365, that the contracts of a *feme covert*, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding at law.

It was held in Michigan, under their statute of 1855, that the wife may deed her land without her husband joining. *Farr v. Sherman*, 11 Mich. 33; *Watson v. Thurber*, *Id.* 457. She need not when acting with her husband be examined separately. The husband may deed directly to the wife. *Burdeno v. Amperse*, 14 Mich. 91.

By the act of April 10th, 1862, the Legislature of New York provide, that any married woman possessed of real estate as her separate property, may bargain, sell, and convey such property, and enter into any contract with reference to the same, with the like effect in all respects as if she were unmarried, and she may enter usual covenants for title, which covenants, if broken, shall be obligatory to bind her separate property. Any married woman while married may sue and be sued in all matters having relation to her sole and separate property, or which may come to her by descent, devise, bequest, purchase, or the gift or grant of any person, in the same manner as if she were *sole*. She may sue for injury done to her person. She may execute any necessary bond in any action; and if the bond is broken or forfeited her estate shall be liable. No bargain or contract made by the wife shall be binding upon the husband, and

he is not liable for any costs. Judgments against a married woman may be enforced by execution against her own sole and separate property in the same manner as if she were sole.

Under the legislation in Alabama it is held, that a husband and wife cannot enter into a mortgage of her statutory separate estate for the purpose of subjecting it to sale for the payment of the husband's debts. *Bibb v. Pope*, 8 Am. Law Reg. (N. S.) 490.

In South Carolina the late English doctrine is not recognized. *Ewing v. Smith*, 3 Desauss. Eq. 417; *Wilson v. Cheshire*, 1 M'Cord Eq. 233; *Magwood v. Johnson*, 1 Hill Eq. 228.

In Tennessee, in *Morgan v. Elam*, 4 Yerg. 375, after a full examination of the cases, the court came to the conclusion, that a wife could not affect the title to the trust property except in the way and manner provided in the trust deed.

In *Lancaster v. Dolan*, 1 Rawle, 231, the Supreme Court of Pennsylvania regret that the English decisions recognize the right of a married woman to dispose of or encumber her separate property although the provisions in the trust deed do not specially authorize her to do so; and the court held, that the wife had no power to convey except to the extent of the power clearly given in the conveyance. In *Cochran v. O'Hern*, 4 W. & S. 95, it is said, "whatever uncertainty there may be in England as to the extent of the power of a *feme covert* over her separate estate, the law is well and judiciously settled in Pennsylvania, that a married woman is to be deemed to possess no power in respect to her separate estate but what is particularly given or reserved to her by the instrument creating the estate." *Thomas v. Folwell*, 2 Whart. 11, discards the English rule. Such, also, is the case of *Chrisman v. Wagoner*, 9 Penn. St. 473. In *Wallace v. Coston*, 9 Watts, 137, it was held, that a married woman had not charged her separate estate by an agreement to pay board

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for her aunt. The statute in that State provides, "In all cases where debts may be contracted for necessities for the support and maintenance of the family of any married woman, it shall be lawful for the creditor to institute suit against the husband and wife. He is first to have execution against the husband's estate or property, and on failure to make the money, may have execution against the separate estate of the wife." This proviso is added: "That judgment shall not be rendered for the plaintiff against the wife, unless it shall appear that the debt was contracted by the wife or incurred for articles necessary for the support of the family of the said husband and wife." It was ruled in *Murray v. Keyes*, 35 Penn. St. 384, that the word "or" in the proviso is to be read "and;" that beyond proof that the debt was for necessities for the support of the wife's family, it must appear to have been contracted by the wife or in her name by her authority. This was approved in *Barto's Appeal*, 55 Penn. St. 386, where it was held a sufficient defense in a suit to charge her lands for improvements thereon, that she had not consented to the same.

In Iowa, by sections 2505 and 2506, it is declared, that the husband is not liable on contracts made by the wife in relation to her separate property, or on those which purport to bind herself only; nor is the property of the wife, or the rents or income, liable for the debts of the husband. It is also provided that the expenses of the family—the education of the children, &c., shall be chargeable upon the property of both husband and wife or either of them. Section 2508 allows "married women abandoned by their husbands to obtain authority from the District Court to act, and to transact business as though unmarried." In giving construction to these sections it was ruled, in *Jones v. Crosthwaite*, 17 Iowa, 393, that the purpose of the act was to protect the rights of married women in their property, but not to invest them with power to make contracts as a *feme sole*, and that their incapacity to make general personal con-

tracts, except "for the expenses of the family," &c., is not removed.

In California an act "defining the rights and duties of husband and wife," April 17th, 1850, section 6, provides with respect to the separate property of the wife, that the husband shall have the management and control during the continuance of the marriage, "but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon examination separate and apart from her husband," etc. Wood's Digest, 488. Under this law it is held, in *Maclay v. Love*, 25 Cal. 367, overruling *Miller v. Newton*, 23 Cal. 554, in which COPE, C. J., had dissented, that a married woman has no power to create any charge, or lien, or incumbrance, upon her separate estate, except by an instrument in writing, signed and acknowledged by the wife as provided by law; that a court of equity has no power to enforce any claim or demand as a charge, lien, or incumbrance on the separate estate of a married woman, unless such claim or demand has become a charge, lien, or incumbrance thereon by virtue of a contract evidenced by an instrument in writing signed and acknowledged by the wife. This ruling was recognized and affirmed in *Brown v. Orr*, 29 Cal. 120; *Dentzel v. Waldie*, 30 Cal. 138; and in *Smith v. Greer*, 31 Cal. 476, where it was held she could not charge her separate estate by the execution of a promissory note.

In this State it is declared, that "no lands of any married woman, shall be liable for the debts of her husband; but such lands and the profits therefrom, shall be her separate property, as fully as if she was unmarried: *Provided*, That such wife shall have no power to incumber or convey such lands, except by deed, in which her husband shall join." 1 G. & H. 374, sec. 5.

It seems that by this provision a *feme covert* occupies the

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position in regard to her real estate which is recognized in England by the late cases—that she is as to such estate a *feme sole*, restrained only by the statute here, as by the deed of settlement in England, in her power to incumber or dispose of it. As the rule, however, is, that a *feme covert* cannot contract, and the power to do so in regard to her separate estate is the exception, it seems but the result of well established legal principles to apply the doctrine stated by Chancellor KENT and adopted by the New York, Massachusetts, New Jersey, Pennsylvania, Tennessee, and South Carolina courts, that the intent to deal with the property must appear, and is not to be assumed. And why should a court of equity enforce against the property of a married woman a contract void in law and from which no benefit results to the property? The power to incumber has been always recognized as only resulting from her incidental power to dispose of her estate, and where the transaction in which she engages has no connection with that estate and there is no purpose expressly indicated to charge the estate, we discover no ground upon which a court can declare an incumbrance of her property.

So far as the profits of her real estate are considered, she has the same power of disposition as a *feme sole*; and, therefore, where she has indicated her purpose to deal with such profits, a court will give effect to her contracts.

Our statute clearly contemplates that the real estate of a married woman shall be a source of benefit and profit to her, and when it is remembered that to render such property available at the date this act was passed in this State, a reasonable amount of expenditure upon the property was required in a large proportion of the cases within its contemplation, and that the act was intended, as the policy of courts had always leaned, for the benefit of married women, and as a protection both against improvident husbands and against their own rash contracts, a construction of the statute giving them power to deal with their real estate so as

to secure its benefits to themselves, seems required and consistent with its spirit and language. A construction that would limit the right of the wife to deal in regard to her real estate so as to preserve her ownership, secure its enjoyment, or make it capable of yielding her an income, unless with the assent of her husband she executed a mortgage, would render her, as to that portion of her estate, entirely dependent upon the will of the very person against whose arbitrary acts the statute intended to guard her.

In the restricted interpretation given to their statute, we think the Supreme Court of California lost view of the purpose of the legislature. We regard a construction which permits the wife to deal with her lands so far as to render them a source of profit and income, or of personal enjoyment and use, and so far as to protect her title, as in best accord with the spirit of our legislation.

We do not intend to be understood as implying that the general protecting supervision which has so long been exercised by courts of equity over the property of married women, protecting them from imposition and fraud, has been withdrawn by the statute. It must therefore appear that any contract relating to the property of a married woman, which is sought to be enforced in equity, is conscionable, and where it relates to the betterment of her real estate, that it is reasonably calculated to promote that end. Within this limitation, it seems reasonable to conclude that, inasmuch as the statute makes the wife owner as a *feme sole* of the rents and profits of her real estate, and as the act is clearly intended for her benefit, a court of equity may permit her to contract with regard to her real estate so that an income may be derived therefrom.

The complaint in this case does not charge the wife with any intent to contract with regard to her separate estate. The fact that the goods were sold and credit was given by the appellants on the faith of the property, is nothing more than an averment of their opinion of what was necessary to create a charge against the land or its income. Their

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intent, however, is not sufficient; the married woman must also intend thus to contract.

The demurrer was therefore properly sustained to the complaint.

Judgment affirmed, with costs.

S. Stansifer and F. Winter, for appellants.

F. T. Hord and A. W. Prather, for appellees.

31	108
198	68

LINDLEY and Another v. CROSS and Wife.

MARRIED WOMAN.—*Separate Property.*—A married woman has, in this State, whatever power is incident to a complete holding and full enjoyment of her separate real estate, with a restriction upon her power to incumber or alienate the same.

SAME.—*Improvement of her Real Estate.*—Where an improvement made by a married woman upon her real estate is necessary and proper for a full and complete enjoyment of such real estate, she can charge her separate property with debts created in making the improvement.

SAME.—*Court's Protecting Control.*—The power of a married woman to make new improvements upon her real estate, for the purpose of preventing its abuse, is under the control of the court trying the cause involving the liability of her separate property to answer for the debts so created.

SAME.—*Pleading.—Mechanic's Lien.*—A complaint to enforce a material-man's lien for lumber furnished to erect a dwelling house upon the separate real estate of a married woman, the portion relating to the lien showing an insufficient notice, was held bad on demurrer for want of averment that the dwelling house was necessary and proper for a full and complete enjoyment by the married woman of the real estate in question.

MECHANIC'S LIEN.—*Notice.—Reformation of.*—A notice of intention to hold a material-man's lien erroneously described the property as lots "6 and 7," the true description being "3 and 4." Suit to enforce the lien, the complaint alleging, that the ownership of the property remained unchanged; that no third person had acquired any rights that would be affected by a correction of the mistake; and that the materials furnished were the only materials of the kind ever furnished by plaintiff to defendant.

Held, that the notice was insufficient to create the lien, and that the court had no power to reform it.

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PRACTICE.—*Fraud.—Resulting Trust.*—Where a conveyance of real estate, for a valuable consideration, is made to one person, the consideration being paid by another, for the purpose of defrauding the creditors of the latter, such a creditor may, under the code, have a complete remedy in one action: a judgment may be obtained against the debtor and the real estate in question subjected to the payment of the judgment.

APPEAL from the Bartholomew Common Pleas.

GREGORY, J.—Suit by the appellants against the appellees. The complaint is in two paragraphs. The first avers, that Susan Cross, being the owner in fee of lots 3 and 4 in Judd's addition to the town of Elizabethtown, in Bartholomew county, undertook, with her husband, Thomas, to erect and did erect thereon, a new building, to wit, a dwelling house; that defendant Thomas, with the knowledge and consent of Susan, and as her agent therefor, purchased of the plaintiffs lumber for the building, which was furnished and delivered under the contract by the plaintiffs to the defendants, a bill of particulars of which is set forth, amounting in the aggregate to \$158.58; that the lumber was used in the building, and became a part thereof; that prior to the expiration of sixty days from the furnishing of the lumber and the completion of the building, the plaintiffs filed a notice in the recorder's office of Bartholomew county, intending thereby to retain and hold a lien on the property for the payment of the lumber so furnished; that by mistake there was and is a misdescription in the notice, the property being described therein as lots "6 and 7," instead of "3 and 4;" that Susan is still the owner of the property; that no third persons have acquired any rights that would in any way be affected by a correction of the mistake; and that this was the only lumber ever furnished by the plaintiffs to the defendants. A copy of the notice is made a part of the complaint.

The second paragraph charges, that on, &c., the defendant Thomas Cross purchased from one Oliver Judd lots 3 and 4, in Judd's addition to the town of Elizabethtown, in Bartholomew county, and paid a portion of the purchase-mon-

Lindley and Another v. Cross and Wife.

ey therefor and gave his note for the residue, with one W. W. Leek as surety thereon, which yet remains unpaid; that said Thomas, on &c., caused Judd to convey the property to Susan, the wife of said Thomas; that the conveyance was not recorded until the 30th of July, 1866; that after the purchase the defendant Thomas undertook to and did build on said lot a new dwelling house, and said defendant, on the 1st of June, 1866, employed plaintiffs to furnish lumber, as set forth in the bill of particulars filed with the complaint, amounting to \$158.58; that the defendant Thomas, to induce the plaintiffs to furnish the lumber, represented to them that he was the owner of the lots; that at the time of the contract Judd had not made a deed to any one therefor, but said Thomas held the same by title-bond; that relying on the representation and believing said Thomas to be the owner thereof, the plaintiffs furnished the lumber under the contract from the date thereof to the 27th of July, 1866, which was used in the construction of the building; that Susan Cross knew that the plaintiffs were furnishing the lumber and concealed from them the fact of her title; that the lumber was furnished with her approbation and under her encouragement; that the conveyance to Susan Cross was fraudulent and void; that said Thomas, being indebted to Judd for the residue of the purchase money, and seeking to defraud Leek, the surety, and, in case the claim could not be collected of Leek, to cheat and defraud Judd, and to cheat and defraud other creditors, and especially the plaintiffs, caused the conveyance to be executed to Susan Cross, his wife; that Thomas Cross is wholly and notoriously insolvent, having no property other than said real estate; that the conveyance to the wife was without any consideration, whatever passing from her. This paragraph then charges the notice and mistake as set forth in the first.

The appellee Susan Cross filed her separate demurrers to each paragraph of the complaint. The appellee Thomas Cross also filed his separate demurrers to each paragraph of

the complaint. The demurrers were sustained, and judgment was rendered against the appellants.

The act of May 31st, 1852, touching the marriage relation and liabilities incident thereto, provides, that "no lands of any married woman shall be liable for the debts of her husband; but such lands and the profits therefrom shall be her separate property, as fully as if she was unmarried: *Provided*, That such wife shall have no power to incumber or convey such lands, except by deed, in which her husband shall join." 1 G. & H. 374, sec. 5. The power of a married woman over her lands under this provision of the statute has been the subject of frequent investigation without coming to any very satisfactory conclusion on the subject. See *Major v. Symmes*, 19 Ind. 117; *Cox's Adm'r v. Wood*, 20 Ind. 54; and *Moore v. McMillen*, 23 Ind. 78.

In *Kantrowitz v. Prather*, 6 Am. Law Reg. (N. S.) 602, this court has granted a rehearing, after much consideration, and has decided the case otherwise at this term (p. 92, *ante*).

We are satisfied that this question must be solved by a construction of our own legislation on this subject.

The section cited has in it two inconsistent provisions: one, that such lands and the profits therefrom shall be the wife's separate property as fully as if she was unmarried; and the other, that she shall have no power to incumber or convey except by deed, in which her husband shall join.

To give full force to the latter provision, the wife could do nothing with her lands except to occupy and cultivate them in person; she could make no lease; she could not contract to repair or improve them; and the first provision would amount to little or nothing.

The code provides, that "when a married woman is a party, her husband must be joined with her, except: *First*. When the action concerns her separate property, she may sue alone. *Second*. When the action is between herself and her husband, she may sue or be sued alone; but in no case shall she be required to sue or defend by guardian or next

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friend, except she be under the age of twenty-one years." 2 G. & H. 41 sec. 8.

If a married woman can sue or be sued alone, in respect to her separate property, it seems to be fair to allow her the power of contracting for such aid as she may require in conducting the litigation. It seems clear that the legislature intended to confer upon her the full power of enjoyment, with a restriction on her power to incumber or alienate. Whatever power, then, is incident to a complete holding would seem to be conferred upon her by a fair construction of the statute.

If the improvement in question was necessary and proper for a full and complete enjoyment, then the wife could charge her separate property with the debts created in making it.

The first paragraph, however, is bad, for the want of averment showing that the dwelling house was necessary and proper for a full and complete enjoyment by the wife of the lots in question.

The question of the power of a married woman to make new improvements, being a power liable to abuse, must be under the control of the court trying the case involving the liability of her separate property to answer for the debts created in making such improvements.

The lien of the mechanic or material-man is created by statute, and before either can avail himself of such a lien the statute must be complied with.

The notice charged in each paragraph of the complaint was insufficient to create the lien, and the court had no power to reform it.

The second paragraph is good. It shows a liability of the husband for the debt, and that the holding of the wife is in trust for her husband. Under the code, complete relief can be granted. A judgment may be obtained against the husband for the debt, and the lots in question subjected to the payment of the judgment.

Judgment reversed, with costs; cause remanded, with di-

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rection to overrule the demurrer to the second paragraph of the complaint, and for further proceedings.

F. T. Hord, for appellants.

W. & W. W. Herod, for appellees.

81	111
128	477
81	111
156	571

O'DAILY v. MORRIS.

MARRIED WOMAN.—Contract.—Our statutes do not change the rule of the common law, so far as it applies to the contracts at large of a married woman, that she is incapable of binding herself by an executory contract, and that all such contracts made by her, whether in writing or by parol, are absolutely void at law.

SAME.—Promissory Note.—A married woman carrying on a business in her own name and living with her husband, whom by a written instrument she had made her agent to manage her business, borrowed for her own use a sum of money, which was delivered to her personally, for which she and her husband executed a promissory note, the payee relying on her for its payment.

Held, in a suit on the note, after the woman had been divorced from her said husband and while she was still unmarried, that she was not personally liable on the note.

APPEAL from the Tippecanoe Circuit Court.

ELLIOTT, C. J.—Morris sued Joanna O'Daily, the appellant, and Jeremiah O'Daily, before a justice of the peace, on a promissory note for seventy dollars, executed by them on the 3d of August, 1860. Jeremiah made default. Joanna appeared and answered in three paragraphs:

1. The general denial.
2. That she was a married woman when the note was executed, and it was therefore void.
3. That she was a married woman at the time of making the note, and it was not given for her separate debt.

On the hearing the justice rendered judgment against her, and she appealed to the circuit court, where the cause was

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tried by the court without a jury, which resulted in a finding and judgment against the appellant for the amount of the note and interest. The facts upon which the finding and judgment were had appear in a special finding of the court, and are as follows: In 1858, Joanna was a married woman, and the lessee in her own right of a house and lot in Lafayette, in which she carried on a grocery and provision store, in her own name, and by a written instrument she made her husband her agent to manage her business; that on the 3d day of August, 1860, being still married and living with her husband and carrying on said business, she applied to the plaintiff to borrow seventy dollars, for her own use. The plaintiff loaned her the amount and took the note in suit therefor, relying on her for its payment. The money was handed to, and received by, Joanna personally. There was no evidence as to how the money was used. In 1865, Joanna was duly divorced from her husband and has since remained sole and unmarried.

We are not favored with a brief in behalf of the appellee, and are not aware, therefore, of the grounds on which he bases the right to recover against the appellant.

It is a rule of the common law, too familiar and well settled to need the citation of authorities, that a *feme covert* is incapable of binding herself by an executory contract, and that all such contracts made by a married woman, whether in writing or by parol, are absolutely void at law. There is nothing in the legislation of this State in relation to married women changing this rule of the common law, at least so far as it applies to such contracts at large. It is not sought in this case to render the separate estate of the wife liable for a debt created in reference to her separate estate and for its benefit, and we are not therefore called upon to discuss the doctrine on that subject, but may be permitted to refer to an elaborate discussion of it in *Yale v. Dederer*, 22 N. Y. 450. See, also, *Kantrowitz v. Prather*, at this term, p. 92, *ante*.

This is simply a suit at law upon a promissory note executed by a married woman, in which a personal judgment

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is rendered against her. The note being void, it follows that the judgment upon it is erroneous and must be reversed.

Judgment reversed, with costs, and the cause remanded for a new trial.

H. W. Chase and J. A. Wilstach, for appellant.

W. C. Wilson, for appellee.

 MONTGOMERY and Wife v. SPRANKLE and Another.

MARRIED WOMAN.—Partner.—Separate Property.—A married woman cannot bind herself as the partner of her husband; nor do the facts that she holds herself out as such partner and that her property gives credit to the pretended firm charge her property with an indebtedness contracted by such firm in the course of trade.

APPEAL from the Randolph Common Pleas.

GREGORY, J.—The appellees filed their complaint in the court below against the appellants, charging an indebtedness from the latter to the former for commissions and moneys advanced in the course of trade. It is sought to charge real estate in the name of the wife for this indebtedness, on the ground that she was a partner in trade with her husband, and that she had held herself out as such, thereby giving credit to the firm.

The court found as follows: "That the defendants consigned to the plaintiffs twenty-nine thousand five hundred and thirty and $\frac{4}{5}$ bushels of wheat, which the plaintiffs sold for fifty-three thousand three hundred and ninety-three dollars and eighty-nine cents; that the net proceeds of said sales, after deducting charges for insurance, freight, elevating, storage, inspection, government tax, and commission, was forty-six thousand five hundred and seventy-three dollars:

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and fifty-three cents; that plaintiffs made advances to defendants and paid drafts for defendants' use, amounting to fifty-three thousand six hundred and ninety-six dollars and eighty-six cents; that the consignments were general; that there was no agreement to hold wheat until defendants ordered it sold; that plaintiffs sold none of defendants' wheat contrary to their orders; that plaintiffs are entitled to damages for the excess of advances made by them to defendants over net proceeds of sales of wheat; that the parties agreed that interest should be allowed plaintiffs on such advances; that such excess of advances over proceeds of sales until July 14th, 1865, amounted to six thousand two hundred and twenty-three dollars and thirty-three cents; that defendants were doing business as partners, under the style of Montgomery & Co., during the whole period in which the dealings between the parties were had which are involved in this action; that Emily J. Montgomery is a married woman; that all the capital belonging to defendants that was employed in the business was claimed to be the separate property of said Emily J. Montgomery; that the real estate described in the complaint was purchased and improved with means and funds in the control of Montgomery & Co.; that this real estate and other property claimed by Emily J. Montgomery and used and controlled by the said firm of Montgomery & Co. gave credit to defendants with plaintiffs, and the business between the parties was engaged in by defendants, and the liabilities to plaintiffs were incurred, for the purpose of benefiting the property claimed as the separate estate of Emily J. Montgomery; and that the said James Montgomery has no property subject to execution. The general finding of the court, therefore, is for the plaintiffs, and their damages are assessed at seven thousand and fifteen dollars and eighty-four cents, and that the real estate described in the complaint, with the other property of Emily J. Montgomery, is liable for the payment and discharge of said damages and costs of suit."

A motion for a new trial was overruled. The evidence is made a part of the record by a bill of exceptions.

The complaint, as well as the testimony, shows that the appellant Emily J. Montgomey was, during all these transactions, the wife of the appellant James Montgomery. The proof shows that the real estate described in the complaint was the property of the wife, conveyed to her long before these transactions with the appellees, and that no part of the purchase money had been paid out of the means of the husband.

The only grounds on which the court below could have based its decree against the property of Emily J. Montgomery were, that she held herself out as the partner of her husband, and that her property gave credit to the pretended firm.

It is clear that a married woman cannot bind herself as a partner with her husband. Her contracts during coverture are void. The appellees were bound to know the law. They knew when they were dealing with Montgomery & Co. that Emily J. was a married woman, and they were legally bound to know that her contracts were void. How can it be said, then, that her property gave credit to the pretended firm?

It is claimed, however, that a married woman may charge her real estate by contracting debts. This record does not present a case in which equity would give relief by charging the wife's separate estate. We shall therefore not enter upon that question.

The court erred in overruling the motion for a new trial as to Emily J. Montgomery.

The judgment is reversed as to Emily J. Montgomery, with costs, and affirmed as to James Montgomery, with costs; and the cause is remanded, with direction to grant a new trial as to Emily J. Montgomery, and for further proceedings.

J. E. McDonald, A. L. Roache, and D. Sheeks, for appellants.
W. March and W. Brotherton, for appellees.

Bellows and Others v. Rosenthal.

COPELAND v. CUNNINGHAM and Wife.

MARRIED WOMAN.—*Separate Property.—Rents and Profits.*—The ruling in *Kantrowitz v. Prather*, page 92, *ante*, adhered to.

APPEAL from the Marion Civil Circuit Court.

ELLIOTT, C. J.—This was a suit to subject the rents and profits of the real estate of the wife, Maria Cunningham, to the payment of a debt contracted by her during coverture, for a stock of milliner's goods purchased by her for her daughter. The court sustained a demurrer to the complaint. The correctness of that ruling is the question presented in this court.

The contract had no connection with the real estate of the wife. The debt was not contracted for its repairs or improvement, or to secure to her its use and enjoyment. Nor does it appear that she intended thereby to charge the rents and profits of her estate.

The contract was void at law, and, under the ruling in *Kantrowitz v. Prather*, at this term, is not such an one as equity will enforce against the rents and profits of the wife's separate estate.

It follows, that there is no error in the ruling of the Circuit Court on the demurrer.

Judgment affirmed, with costs.

J. L. Ketcham and *J. L. Mitchell*, for appellant.

B. K. Elliott and *J. B. Black*, for appellees.

BELLOWS and Others v. ROSENTHAL.

MARRIED WOMAN.—*Separate Property.—Husband's Debts.—Evidence.*—A married woman carried on the business of a clothing merchant in her own

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name, employing her husband as a clerk, the money invested in the business having been received by her during coverture, through a trustee, as a gift from her brother, to be invested in such business, and when so invested to be under her sole control, the business to be carried on in her name and for her sole use and benefit, and in the event of her death the money to go to her children by her said husband.

Held, that personal property purchased by her with the proceeds of said business was not subject to the debts of her husband.

Held, also, in a suit by such married woman to recover such personal property levied upon under an execution issued on a judgment against her said husband, that there was no error in admitting in evidence a written agreement between her said brother and said trustee, under which the money was advanced to her, its execution having been proved.

APPEAL from the Clark Circuit Court.

GREGORY, J.—This was an action for the possession of personal property, by the appellee against the appellants. The court below on a trial of the issue of fact found for the plaintiff, and overruled a motion for a new trial.

The appellee is the wife of Bernard Rosenthal, and has been for some twenty years. Some fourteen years ago the husband failed in business at Louisville, Kentucky. On the 1st of August, 1860, one Schlaughter, a brother of the appellee, advanced the sum of three thousand dollars under a written instrument signed by himself and one Silberman, the trustee of Mrs. Rosenthal. That writing is as follows: "I, Joseph Schlaughter, &c., have this day appointed Levi Silberman of &c., trustee for the purposes hereinafter named. Whereas I have this day delivered to Levi Silberman the sum of three thousand dollars, to be held by said Silberman for the sole use and benefit of my sister-in-law, Mrs. Barbette Rosenthal, wife of Bernard Rosenthal, which sum of money is to be invested in a general clothing business by said Silberman, for the use of Mrs. Barbette Rosenthal solely, said Silberman is hereby authorized to hand over to Mrs. Barbette Rosenthal, or to any person she may select, said sum of three thousand dollars, to be invested as above; and said sum when so invested is to be under the sole control of said Barbette Rosenthal, the business to be carried on in her name and for her sole use and benefit; and when so in-

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vested said Barbette Rosenthal is to be solely liable for all debts and demands that may arise or be contracted during the prosecution of the business; and said Joseph Schlaughter and Levi Silberman are not to be held liable for any debts or demands whatever that may accrue during the prosecution of said clothing business. Said Silberman hereby assumes the trust herein created; and in the event of the death of said Silberman or said Schlaughter, then said sum of three thousand dollars is to be vested fully in said Barbette Rosenthal and subject wholly to her control; and in the event of the death of said Barbette Rosenthal, then said sum of three thousand dollars is to be vested in her husband, Bernard Rosenthal, for the sole use and benefit of the children of said Barbette and Bernard Rosenthal. Whenever said Levi Silberman shall file with said Schlaughter the receipt of said Mrs. Barbette Rosenthal jointly with her husband, Bernard Rosenthal, said Silberman shall be discharged fully from the obligations of this trust, said receipt specifying when and to whom said sum of three thousand dollars had been paid."

With this money the appellee engaged in the clothing business in Jeffersonville, in this State, in her own name, employing her husband as a clerk. The property in controversy was purchased by the appellee with a part of the proceeds of this business.

Mrs. Rosenthal, on her cross examination, states that the money was borrowed; and another witness says, "I think she was to pay the money back." There is no evidence that the husband ever joined with his wife in a promise to pay back the money. It is possible from the evidence that the court below might have found that Mrs. Rosenthal promised to return the money to Schlaughter. But we have a right to assume that the court did not so find. And such a finding would have been in face of the written instrument under which the money was advanced. By that instrument the money was a gift to the appellee, and in case of her death, to go to her children by her present husband.

And, moreover, a promise by the appellee to return the money would have been void, as she was laboring under the disability of coverture. We think the court below was warranted in finding that the money came to the appellee during coverture, by gift, and that under the statute (1 G. & H. 295) it was the separate property of the wife, and the proceeds thereof are not subject to the debts of the husband.

The appellants claim the property under a levy on an execution issued on a judgment against the husband.

The court below committed no error in admitting in evidence the written instrument under which the money was advanced, its execution having been proved.

Judgment affirmed, with costs.

J. H. Stotsenburg, T. M. Brown, and J. Reid, for appellants.

G. V. Hawk, R. M. Weir, J. G. Howard, and J. F. Read, for appellee.

RICHARDSON v. HITTLE.

81	119
159	418

DURESS.—*Pleading.*—An answer setting up coercion must aver the facts constituting it.

SAME.—*Husband and Wife.*—Much less force or putting in fear by a husband will amount to coercion which will avoid the deed of his wife than would be necessary coming from a stranger.

SAME.—*Wife's Separate Property.*—*Mortgage.*—Suit upon a note payable in bank and a mortgage to secure the same, executed by husband and wife and assigned to the plaintiff. Answer by the wife, showing that the note and mortgage were given for the debt of the husband, and that the land mortgaged was the separate property of the wife, and averring, "that she was induced by the persuasions of said payee and the coercion of her said husband to execute said note and mortgage."

Held, that the answer was bad on demurrer.

APPEAL from the Decatur Common Pleas.

GREGORY, J.—Suit by Hittle against the appellant, Mary

Richardson v. Hittle.

Ann Richardson, and her husband, on a note and mortgage executed by the husband and wife to one Carpenter, and by the latter assigned to the appellee. The note is payable at the First National Bank of Greensburg. The mortgage bears date the 20th of March, 1867. A notary public certifies, that the appellant, "Mary A. Richardson, personally appeared and acknowledged the execution of the annexed mortgage." The certificate is signed by the notary and his official seal is attached.

The appellant answered in two paragraphs. The first need not be noticed, as no point is made on it. The second avers, "that at the time of the making of the note and mortgage sued on, she was, and still is, the wife of William H. Richardson, her co-defendant; that said note and mortgage were made to said payee thereof by said William H. Richardson on a contract for the purchase of an interest in a certain patented invention purchased by said William H. Richardson from said payee of said note, and for no other cause or consideration whatever; that the lot of land mentioned and described in said mortgage then was, and still is, the separate property of her, said Mary Ann Richardson, the fee simple title thereof being in her and acquired by her prior to her marriage with said William H. Richardson; and that she was induced by the persuasions of said payee and by the coercion of her said husband to execute said note and mortgage."

The court sustained a demurrer to this paragraph; and this presents the principal question in the case.

It is urged that the paragraph is bad, for not averring the facts which constituted the coercion.

Fraud, duress, and coercion, are alike made up of distinct facts, and all may vary greatly in their circumstances. It has been repeatedly ruled by this court, that an answer setting up fraud must aver the facts, and that an answer averring fraud without stating the facts constituting it is bad on demurrer. There is no difference in principle, as to

pleading, between fraud and coercion. Mr. Chitty, in his forms, states the facts which constitute duress. 3 Chit. Pl. 964, *et seq.* So are all the precedents.

It is undoubtedly true, as contended for by counsel for the appellant, that much less force or putting in fear by the husband would amount to coercion which would avoid the deed of the wife than would be sufficient coming from a stranger; and for this very reason the facts should be averred, so that the court could determine the question as to whether they amounted to legal coercion or not.

The court committed no error in sustaining the demurrer. Judgment affirmed, with costs.

C. & J. K. Ewing and *J. S. Scobey*, for appellant.

B. W. Wilson and *E. R. Monfort*, for appellee.

CHEEK and Another v. TILLEY.

COUNTY CLERK.—Deputy.—Compensation of.—A county clerk may contract with his deputy that the latter for his compensation shall have a certain share of the fees taxed and collectable in the clerk's office during his deputyship.

INJUNCTION.—Receiver.—In a suit by such deputy against his principal to recover the former's share of such fees, an injunction may be granted, pending the cause, restraining the clerk from collecting or transferring such fees yet unpaid, and the sheriff from paying such fees collected by him to the clerk; and a receiver may be appointed.

SAME.—Pleading.—Amendment.—An amendment called a "supplemental complaint," but containing no supplemental matter, was filed by the plaintiff, over the defendant's objection, before answer, in a suit for an injunction in which a restraining order had been granted.

Held, that there was no error.

SAME.—Motion to Dissolve.—Motion based upon affidavits, to dissolve an injunction before answer. The defendant in his affidavit did not deny certain equities of the complaint, and so much of the complaint essential to the injunction as he denied was supported by other affidavits.

Cheek and Another v. Tilley.

Held, that, under the chancery practice, the injunction should not have been dissolved, and that the code does not change the former rule on that subject.

APPEAL from the Dearborn Circuit Court.

Suit by the appellee against Cheek and Arnold. The complaint alleges, that Cheek, as clerk of Dearborn county, on the 15th of February, 1864, contracted with the appellee to act as his deputy, their contract being set forth in a certain writing, as follows:—

“State of Indiana, Dearborn County, Oct.

“I, John F. Cheek, clerk of the courts of Dearborn county, Indiana, do hereby constitute and appoint William Wirt Tilley my deputy during my term of office, his compensation to be one-half of the fees taxed and collectable in said office. Witness my hand, this 15th day of February, 1864.

(Signed)

JOHN F. CHEEK, Clerk.”

The oath of Tilley as deputy, endorsed upon this appointment, is set out in the complaint, and the plaintiff alleges, that said appointment with said oath was duly filed and entered of record; that he gave bond to said Cheek, and on the said 15th of February, 1864, entered upon his duties as deputy, and continued to perform said duties till the 10th of September, 1867, when, the defendant Cheek having neglected and refused to account for or pay to the plaintiff the sums hereinafter mention, the plaintiff resigned his position as deputy, with the knowledge and consent of the defendant Cheek; that during the period of plaintiff's deputyship, fees to the amount of twelve thousand dollars were taxed and collected by Cheek, as clerk, of which the plaintiff has received only thirty-five hundred dollars, leaving due and unpaid to him twenty-five hundred dollars; that during said period there were taxed and collectable fees to the amount of seven thousand dollars which have not yet been collected, of which plaintiff is entitled to thirty-five hundred dollars; that Cheek is wholly insolvent, and has no property subject to execution out of which plaintiff can make the amount of any judgment he might obtain against him, or

any part thereof; that the only mode in which plaintiff can collect his claim is out of the fees taxed in said office and remaining unpaid; that said Cheek has in his possession and control the fee books and records of said office, and is collecting said fees with the fraudulent purpose of appropriating the whole of them to his own use; and the plaintiff prays that said Cheek and all persons acting under him or by his authority be restrained and enjoined from receiving and collecting any of said fees until the final hearing of this cause. The plaintiff further alleges, that Richard C. Arnold, sheriff of Dearborn county, has in his hands a large number of fee bills and executions issued out of said clerk's office against various persons, which he is proceeding to collect; and plaintiff prays that said Arnold be made a party, and that he and all persons acting under him and by his authority be enjoined and restrained from paying over to said Cheek any portion of such fees and costs that may be collected, until the final hearing of this cause. Plaintiff further avers, that said Cheek has given out in public speeches that plaintiff is not entitled to any portion of said fees, and has declared that he shall not receive or collect any portion thereof; that said Cheek has publicly threatened that plaintiff shall not have access to the books of said office except under the supervision and direction of said Cheek, and has threatened plaintiff with personal violence and death on account of statements made by plaintiff in relation to the condition of the books and records of said office; that plaintiff believes that if said Cheek has notice of this application he will assign said fees, with intent to defraud plaintiff. And the plaintiff prays for a temporary injunction against said Cheek and all persons acting under him, to enjoin and restrain him from collecting or receiving any of such fees, and from transferring the same; that upon final hearing said injunction be made perpetual; and that a receiver be appointed to collect and receive the fees and costs due and uncollected as aforesaid, and to pay to plaintiff such portion thereof as may be found due him.

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The complaint was subscribed and sworn to; a bond was filed; and the same day a restraining order was granted, to continue in force till the second day of the ensuing term, when it was extended to a subsequent day of the term.

The plaintiff, by way of amendment to the complaint, filed a "supplemental complaint." He alleges therein, that he is entitled to one-half of certain sums received by said Cheek, as clerk, from the treasury of said county and appropriated by him to his own use, no account thereof being kept in said clerk's office, being a certain amount allowed to the clerk by the county commissioners for extra services, a certain amount received as fees for services in relation to insane persons, and a certain amount received as compensation for attendance as clerk upon the circuit court and court of common pleas of said county; that he is also entitled to one-half of certain sums received by said Cheek, appropriated to his own use, and not accounted for, except obscurely upon the issue dockets, collected from parties defendants, whom plaintiff is not able to name, in cases of the State against such parties in the circuit court and court of common pleas of said county at certain terms of said courts, such sums being the fees of the clerk in such cases; and also one-half of an amount of fees collected by said Cheek from persons whose names plaintiff does not know, during the period of said deputyship, which amount plaintiff is unable to state, appropriated by said Cheek to himself and not accounted for.

The "supplemental complaint" was subscribed and sworn to, and an additional bond was filed.

To the filing of this amendment defendants objected, for the following reasons:

"1. Because said injunction cannot be sustained and rendered lawful by amending the complaint.

"2. Because any material amendment would prejudice the rights of the defendants."

But the court permitted the filing of the amendment, and defendants excepted.

Pending a motion by defendants to dissolve the injunction, the plaintiff moved that the same be continued in force till the further order of the court. The plaintiff's motion was sustained, and the defendants excepted.

The defendants then moved to dissolve the injunction, for the following reasons:

"1. Because the plaintiff is not entitled to the relief demanded.

"2. Because all the material allegations of said complaint are successfully controverted and denied and are shown to be false by the affidavits filed herewith, marked 'A. B. and C.'

"3. Because said contract set out in the complaint is illegal and void.

"4. Because said contract does not give to the defendant any interest in the fees of said clerk's office.

"5. Because a receiver for the fees of a public office cannot be appointed to protect a private interest and claim of debt.

"6. Because an injunction to restrain the collection of the fees of a public office by the lawful incumbent of the office cannot be sustained to protect and assist in the collection of an individual and private debt.

"7. Because such injunction in fact restrains a public officer from the performance of the duties enjoined upon him by law.

"8. Because the sustaining of said injunction and the appointment of a receiver, as prayed in said complaint, would in fact amount to the appointment of a public officer to a constitutional and elective office.

"9. Because said contract and complaint do not show the plaintiff to have any immediate interest in said fees."

The injunction was continued in force till the further order of the court, and Richard D. Slater, Jr., was appointed receiver and authorized to collect said fees. From the order continuing said injunction and appointing said receiver, the defendants appeal, assigning as error: first, permitting plaintiff, over the objection of defendants, to file his

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supplemental complaint; second, overruling defendants' motion to dissolve the injunction, and continuing said injunction; third, granting plaintiff's motion for the appointment of a receiver, and appointing said receiver.

FRAZER, J.—There was no error in allowing the amendment to the complaint, for such it was, though it is mis-called a supplemental complaint. It contains no supplemental matter. A party has a right by statute to amend his complaint before answer. 2 G. & H. 117.

The contract between the parties does not show an attempt to sell an office, but merely the appointment of a deputy and an agreement that for his compensation the latter shall share the emoluments of the office. In all this there is nothing in contravention of public policy, as is suggested in argument. We can conceive of no valid objection to it. The question has received the attention of other courts, and, so far as we know, such agreements have uniformly received their sanction. *Becker v. Ten Eyck*, 6 Paige Ch. 68; *Mott v. Robbins*, 1 Hill, 21.

It is certainly very plain that the case made by the complaint is a proper one for an injunction and a receiver, pending the cause, unless, as it is argued, such interlocutory action by the court would transfer the duties of the office of clerk from the appellant, or interfere with his exercise of them.

The collection of his fees is not a duty imposed by law. It is a right which belongs to him as an individual, and not an official duty required of him. The plaintiff, according to the facts alleged, has also the same right; for a portion of the fees are also his. This collecting can be performed by a receiver, without in any manner interfering with the discharge by the appellant of all the official duties required of him by law.

Nor do we think that the injunction should have been dissolved upon the affidavits. The appellant did not, under oath, deny his insolvency or his intention to apply the fees of the office, which he might collect, to his own use.

The White Water Valley Railroad Company v. Quick.

So much of the complaint essential to the injunction as he did deny was supported by other affidavits. As the case thus appeared upon the affidavits, the injunction should not, under the chancery practice, have been dissolved, and there is nothing in the code which changes the former rule upon that subject.

The unimportant questions of mere practice which are made cannot affect the case, and need not, therefore, be decided.

Judgment affirmed, with costs.

J. W. Gordon, J. E. McDonald, A. L. Roache, E. M. McDonald, and J. W. Nichol, for appellants.

J. Schwartz, for appellee.

THE WHITE WATER VALLEY RAILROAD COMPANY v. QUICK.

RAILROAD.—*Fences*.—Where a railroad passes upon an embankment erected in the bed of a canal, such embankment must be guarded by fences.

APPEAL from the Franklin Common Pleas.

RAY, J.—This was an action for the value of an animal killed within the grounds of the appellee and at a point where the railroad, after passing along the bank of the White Water Valley Canal, crosses the same upon an embankment erected in the bed of the canal, and not protected by any fence.

In a recent case between the same parties we have held the company liable for the failure to fence. If they may obstruct the bed of the canal with embankments, such embankments may also be guarded by fences.

Judgment affirmed, with ten per cent. damages and costs.

G. Holland and C. C. Binkley, for appellant.

H. C. Hanna, F. S. Swift, and W. G. Quick, for appellee.

Bowser and Others v. Rendell.

BOWSER and Others v. RENDELL.

PRINCIPAL AND SURETY.—*Co-Surety.—Alteration of Writing.*—A promissory note payable to and at a certain bank was signed by A. and B., the former being the maker, the latter his surety, and delivered by A., for a valuable consideration, to C., who, for the purpose of having it discounted for his benefit at said bank, it having been prepared by A. and B. with that expectation, signed the note as maker, without the knowledge or consent of B., upon the requirement of the officers of the bank, but with the express agreement with said officers that he did so as surety or guarantor to the bank for both the other makers, and not as joint surety with B. After maturity the bank sued A., B., and C., upon the note; C. was "not found;" and judgment was rendered against A. and B. by default, upon their failure to appear. C. paid the bank the amount of the judgment under a promise by the bank to assign it to him.

Held, that the signing by C. was not such an alteration of the note as rendered it void as to B.

Held, also, that C. was not a co-surety with B.

Held, also, that C. was entitled to execution for his benefit on said judgment against A. and B., and, A. having become insolvent, such execution was properly levied for the whole amount thereof upon the property of B.

APPEAL from the Noble Common Pleas.

ELLIOTT, C. J.—This was a suit instituted by Rendell against the Merchants National Bank of Fort Wayne, William C. Childs, Jacob C. Bowser, Joseph R. Prentiss, and Daniel M. Falls, to enjoin the collection of a judgment rendered by the Court of Common Pleas of Noble county, in favor of the Merchants' National Bank of Fort Wayne, against Childs and Rendell. On the final hearing, the court enjoined the collection of one-half of the judgment. From this decree the defendants Bowser, Prentiss, and Falls, who are partners, doing business in the name of "J. C. Bowser & Co.," appeal.

The question presented here is as to the sufficiency of the evidence to sustain the finding and decree of the court. The facts, so far as it is necessary to state them for the purpose of a decision of the question involved, are these:—

In February, 1866, Childs was indebted to J. C. Bowser & Co. in the sum of about eight hundred dollars, on

account, and, in addition thereto, had contracted with them for machinery not then delivered, and, at the time named, presented to them a note for three thousand dollars, payable to and at the Merchants' National Bank of Fort Wayne. It was signed by Childs and Rendell, the plaintiff. The note was prepared with the expectation that J. C. Bowser & Co. would procure it to be discounted by the bank. They took the note from Childs at its face, and credited him with the amount of his account, and applied the residue on the contract for machinery. Bowser & Co. presented the note to the bank for discount, but the bank refused to discount it unless they would also sign it. They signed it, accordingly, in their firm name, but with the understanding with the officers of the bank that they did so as sureties or guarantors to the bank for both the other makers, and not as a joint surety with Rendell. It was then discounted by the bank for the benefit of Bowser & Co. When the note matured it was not paid, but was renewed by another note for the same amount, signed by the same parties and with the same understanding. Neither Childs nor Rendell was present when Bowser & Co. signed either of the notes, or when they were discounted. The last named note not being paid at maturity, the bank instituted a suit on it in the Noble Common Pleas Court. Process was duly served on Childs and Rendell, but was returned "not found," as to Bowser, Prentiss, and Falls; and judgment was rendered against Childs and Rendell for the amount of the note and accrued interest. Bowser & Co. subsequently paid the bank the full amount of the judgment and interest, under a promise by the bank to assign the judgment to them. No written assignment of it, however, was ever made. Childs was the principal in the note; Rendell was only his surety. An execution was subsequently issued on the judgment for the benefit of Bowser & Co., which was levied on the property of Rendell, Childs having become insolvent. Rendell was ignorant of the fact that Bowser & Co. had signed eith-

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er of the notes until after the rendition of the judgment against him and Childs, which was rendered on their default to appear to the action.

On the 17th of August, 1866, Childs executed to Bowser & Co. a mortgage on certain personal property, to secure the payment of the sum of \$1,595.76, for which they held his three several promissory notes, amounting in the aggregate to that sum, and also to secure the payment of the note on which the judgment against Childs and Rendell was rendered, in reference to which the mortgage recites, "And whereas the said Bowser, Falls, and Prentiss are the indorsers or sureties for the said Childs on a note for the sum of three thousand dollars, dated June 30th, 1866, payable to the Merchants' National Bank of Fort Wayne, sixty days after date thereof, executed by said Childs and one William Rendell and by the said Bowser, Prentiss, and Falls, by their firm name of J. C. Bowser & Co.," &c.

Under the foregoing state of facts the court found that Bowser & Co. were joint sureties with Rendell for Childs, on the note on which the judgment was rendered, and that, having paid the judgment, they were only entitled to recover from Rendell one-half the amount so paid; and rendered a decree perpetually enjoining the collection of one-half of the amount of the judgment from Rendell, and ordering a new execution on the judgment against him for the other moiety, for the benefit of Bowser & Co. The decree further provides that upon the payment by Rendell of one-half of said judgment and interest, the proceeds of the chattel mortgage executed to Bowser & Co. by Childs should first be applied to the payment of the three promissory notes named therein, amounting to \$1,595.76, and the residue, if any, should be paid equally to Rendell and Bowser & Co., and that each of the parties should pay one-half the costs of this suit.

It is insisted on the part of Rendell, the appellee, that the finding and decree of the court below should be sustained on two of the grounds stated in the complaint, viz.:

First, that the signature of Bowser & Co. to the note, as makers, was a material alteration of it, and that as it was made without the knowledge or consent of Rendell, it rendered the note void as to him, and he is not, therefore, liable to pay any part of the judgment to Bowser & Co.

Second, that as Bowser & Co. were liable to the bank as makers of the note, and had paid the amount of the judgment to the bank, it was thereby satisfied and discharged; and if Rendell is liable over to Bowser & Co., their remedy is by an original action, and not by an execution for their benefit, on the judgment in favor of the bank.

These propositions will be examined in their order.

No question is better settled than that a material alteration of a written instrument by one who claims the benefit of it, made without the consent of the party against whom it is sought to be enforced, renders it void. But the question here is, did the signature of Bowser & Co. to the note, under the circumstances, constitute such material alteration? It did not change the nature of the obligation, or otherwise injuriously affect the liability of Rendell upon it. Without their signature he was the sole surety of Childs and liable for the whole debt. If by adding their signature Bowser & Co. became a co-surety with Rendell, he would be benefitted thereby, as, in that case, they would be liable to him for contribution; and if, as they contend, Bowser & Co. signed the note, not as a co-surety with Rendell, but as the surety of both Childs and Rendell, the liability of the latter would be the same with as without their signature.

Harper v. The State, 7 Blackf. 61, was a suit on a bond under seal, against several defendants, two of whom, Robinson and Collins, pleaded *non est factum*, and it was shown on the trial that, two years after the execution of the bond by them, it was altered by inserting the names of the other defendants, as co-obligors in the bond, and by adding their signatures to it, without the assent of Robinson and

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Collins. It was held, that the bond was thereby rendered void as to them.

That decision, however, was evidently governed by the strict rules of the common law in relation to deeds and other sealed instruments, requiring that they should be complete at the time of execution, and any change or alteration of them afterwards (even in an immaterial part, according to some authorities) rendered them void. See *The State v. Polke*, 7 Blackf. 27. But the same strictness does not apply to unsealed instruments. In the present case, Rendell testified that the note was a mere printed blank when he attached his signature to it, and that he signed it as surety for the accommodation of Childs. The signing of the note in blank, and the delivery of it to Childs in that condition, was an implied authority to him to fill it up as he might desire. Rendell understood that the note was to be discounted in bank, and if other sureties were necessary for that purpose, it cannot be questioned that Childs might have procured their signatures to be added, without rendering it void as to Rendell. Childs delivered the note to Bowser & Co. for a valuable consideration, and they transferred it to the bank for their own benefit, and in doing so attached their signatures to it as makers. If, however, they had signed it on the back as guarantors or indorsers, no one would contend that it thereby would have been rendered void as to Rendell; and yet the effect would have been the same as to him, or, at any rate, it would not have bettered his condition.

But we need not pursue the question further. The note, as to Rendell, has passed into judgment. The suit was instituted on it against all the makers (including Bowser & Co.) jointly. Rendell was legally notified of its pendency. The note was valid on its face, and if he had any defense to it, then was the proper time to make it; but he failed to appear, and suffered judgment to be rendered against him by default; and it is now too late to present the defense.

He cannot be permitted to go behind the judgment for that purpose.

But the question remains, does the evidence sustain the finding that Bowser & Co. were co-sureties with Rendell? We do not think it does. As between the makers and the payee, the relation of the parties is fixed by the note itself. As to the payee, the makers are all principals, and equally liable. But the rights and liabilities of the makers amongst themselves depend upon the contract between them, or upon the relation each may sustain to the other and to the transaction. Childs being the principal and the others only sureties, he is primarily liable and bound to refund any payment made by either of the others. But the question here is, as to the relation between Rendell and Bowser & Co., all of whom sustain the relation of sureties to Childs. Sureties may make any contract they please, as between themselves. One surety may thus be exempt from all liability to contribute. Such a contract may be implied from the nature of the transaction and such extrinsic facts and circumstances as tend to show such to have been the intention of the parties. As, if one surety enters into the original contract at the request of the others, there might, as to him, be an implied waiver of the right to contribution; and if compelled to pay the debt he could recover the whole amount from the other sureties. Such an agreement, whether express or implied, may be shown by parol evidence. *Lacy v. Lofton*, 26 Ind. 324; *Craythorne v. Swinburne*, 14 Vesey, 160; *Sisson v. Barrett*, 6 Barb. 199; S. C., 2 Comst. 406; *Robison v. Lyle*, 10 Barb. 512.

The case last cited is very similar to the one at bar. There the note was given for money loaned by the payee. It was joint and several in terms, and was signed by five persons as makers; the last of whom, who was the defendant in the case, added the word "security" to his signature. It appeared that the first signer was the principal, all the others being sureties. The second one paid the note, and sued the last one, Lyle, for contribution, and recovered in the lower

court, and Lyle appealed. It was shown upon the trial that the defendant made the application to the payee of the note for the loan, and brought the note to him signed by all the other makers. The payee required him to add his signature as a condition of the loan. The defendant claimed that he signed the note as surety for all the other makers, and, for the purpose of showing that fact, offered on the trial to prove a conversation between himself and the payee at the time of procuring the loan, but the court excluded the evidence. The Supreme Court held the evidence admissible, and reversed the judgment because of its exclusion. In the decision of the question, the court said, in reference to the evidence excluded, "It was a part of the transaction which was the subject of inquiry. It was important to ascertain what was in fact the contract between the defendant and the payee of the note. The defendant's signature did not furnish evidence sufficient to determine that question. It became necessary, therefore, to have recourse to extrinsic evidence. That evidence must, from the very nature of the case, consist of the declarations of the parties at the time of the transaction. The negotiation which resulted in the loan was as much a part of the transaction as the receiving of the money. What was said by the parties was pertinent evidence for the purpose of showing what was the true character of the defendant's contract. Such declarations, made at the time of the transaction, and expressive of its character, motive, or object, are to be regarded, as has been well said, as 'verbal acts, indicating a present purpose and intention,' and are therefore admitted in proof, like any other material facts. They are parts of the *res gesta*."

In the case before us, Bowser & Co., being the holders of the note, desired it discounted in bank for their own benefit; the bank made it a condition to its discount that they should add their signature to it as makers. They did so, to procure its discount, but with the express understanding between them and the bank that they signed it as sureties for both the other makers, and not as co-sureties with Rendell

for Childs. This understanding was entirely consistent with the relation then existing between them and the other makers of the note. As owners of it, both Childs and Rendell were liable to them as principals, and it is evident that they did not intend to change that relation, by adding their signature to procure it discounted for their own accommodation, and it is clear from the evidence that they did not do so. But it is claimed by the appellee that the recital in the chattel mortgage from Childs to Bowser & Co. is in conflict with the parol evidence on this point. We do not so understand it. The recital was made by Childs and not by Bowser & Co., but we see nothing in it inconsistent with the other evidence and facts in the case.

We conclude, therefore, that the evidence does not sustain the finding of the court.

The only remaining question is, are Bowser & Co. entitled to an execution on the judgment against Childs and Rendell, for their benefit? This question is settled in the affirmative by section 676 of the code (2 G. & H. 309), which provides that when "any person being a surety in any undertaking whatever, has been or shall be compelled to pay any judgment or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship," the judgment shall remain in force for the use of the person making such payment; and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use.

The judgment is reversed, with costs, and the cause remanded for a new trial, and further proceedings, not inconsistent with this opinion.

W. H. Coombs and *W. H. H. Miller*, for appellants.

A. Ellison and *F. Prickett*, for appellee.

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HENRY v. RITENOUR.

CONTRACT.—Mental Capacity.—Mere dullness of intellect, from whatever cause, does not amount to incapacity to contract.

SAME.—Intoxication.—Where a party to a contract is voluntarily intoxicated at the time of making it, to the extent only that he does not clearly understand the business, this does not render his contract void or voidable where no advantage is gained by dealing with him.

SAME.—Consideration.—It is a sufficient consideration for a promissory note that the payee, to procure its execution by the maker, surrenders a valid and subsisting demand for a like amount against a third person.

SAME.—Failure of Consideration.—A. being indebted to B. and C. to A. in a certain like amount, and D. being indebted in a like sum to C. on account of certain land conveyed by C. to D. by deed with covenants, by the agreement of all the parties D. gave his note to B. for such sum, B. released A., and A. released C.

Held, in a suit on the note by the payee against the maker, that, where there was no express agreement by the payee before or at the time of the making of the note that it should not be collected if the title to the land should fail, such failure of title could not prevent the payee from recovering on the note.

APPEAL from the Warren Common Pleas.

FRAZER, J.—This was a suit upon a promissory note.

There was an answer in five paragraphs. A demurrer was sustained to the second, third, and fifth of these, and error is assigned thereon. The third is however abandoned here, very properly.

The second paragraph of the answer alleged, that the note was procured by unlawful means, to wit, that the defendant cannot write or read writing; that when he signed the note he was under restraint and duress, in that he was somewhat under the influence of liquor and not very clear in his knowledge of the transaction, was told by persons that it was necessary that he should execute the note in order to save his land from forfeiture, that the plaintiff with one Julian procured him to sign the note when his mind was not fit for business, being under the influence of liquor; and that he was coaxed to one side and induced to sign the note by undue influence and unlawful persuasions (not

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specified); wherefore the consideration of the note has failed.

This paragraph, it is urged, was good. We cannot reach that conclusion. It presents a very singular and novel idea of what is necessary to constitute either duress or a failure of consideration, both of which defenses the pleader has seemed to think it embraced. It cannot be necessary to speak of it in either light; for it seems to be destitute of about every element necessary to make it either the one or the other. It is presented here as sufficiently showing fraud in procuring the execution of the note. But it is also a failure in that. No false representations seem to have been made; it does not appear by the averments that the consideration was not ample and honest; in short, nothing appears to show that the defendant would be wronged by being compelled to pay the note. He was intoxicated and did not clearly understand the transaction, but it is not alleged that it was not, nevertheless, a proper transaction. No facts are alleged showing fraud or undue influence. His intoxication seems to have been voluntary, and to have gone to the extent only that he did not clearly understand the business. That is not enough, however, to render his contract void or voidable, in the absence of any advantage having been gained by dealing with him. Mere dullness of intellect, from whatever cause, does not amount to incapacity to contract.

The fifth paragraph of the answer is no better than the second, which it greatly resembles, and, indeed, in its substantial averments, differs from only in alleging that the representation that the defendant would lose his land if he did not execute the note was false. It does not appear by the paragraph, however, that he had any land to be put in peril. It cannot be useful to discuss it further.

The material issue was formed on the fourth paragraph of the answer, by a denial thereof. That paragraph averred (when stripped of its useless verbiage), that one Julian owed the plaintiff the amount of the note sued on, and one Mitcham owed Julian a like sum; that Mitcham sold and

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conveyed to the defendant, by deed with covenants, a tract of land, to a part of which it turned out that he had no title, for which the defendant executed the note directly to the plaintiff by agreement of all parties, thus satisfying the claim of Julian upon Mitcham, and the plaintiff upon Julian; it being at the time agreed by all parties that if the title to the land failed in part, then the defendant should not pay to the extent of the value of the title which might prove to be bad, which was the whole of it save about two hundred and fifty dollars worth, which sum had been paid in hand to Mitcham when the deed of conveyance was made; and that the defendant had been evicted.

This issue was found for the plaintiff; and, over a motion for a new trial, judgment was rendered.

The action of the court below in overruling the motion for a new trial is presented for review upon two grounds: first, that the court erred in giving and refusing instructions; and second, upon the evidence. Upon the latter point it is enough to say that the evidence was conflicting and we cannot, therefore, interfere.

The following instruction was asked by the defendant, and refused: "If the jury believe from the evidence that the plaintiff had knowledge before the note was given for what it was given, and that the consideration was for land; and if they believe that Julian, Mitcham, the plaintiff, and the defendant entered into an agreement that the defendant should make his note directly to Julian, although the land came from Mitcham to the defendant, because there was an indebtedness from Mitcham to Julian and from Julian to the plaintiff; and if they believe that the title of the land failed afterwards, and the defendant was evicted; then the consideration of the note has failed, and the plaintiff cannot recover on the note now in suit, and the jury must find for the defendant."

But the court did instruct as follows: "It is admitted that one Julian was indebted to the plaintiff; that one Mitcham was indebted to Julian; and the defendant was in-

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debted to Mitcham on account of the purchase of certain land; and it was agreed that the defendant should give his note to the plaintiff, and that the plaintiff should release Julian, and that Julian should release Mitcham. These facts being admitted, you should find for the plaintiff, unless you should find that Ritenour (the plaintiff) expressly agreed at the time or before the making of the note that it should not be collected if the title to the land failed. The mere fact that the title failed is not sufficient to prevent the plaintiff's recovery."

There was reason enough for refusing the defendant's instruction in the fact that it was not applicable to either the issues or the evidence. There was neither averment nor evidence that the note was given by the defendant to Julian. On the contrary, it was alleged by the complaint, and admitted by the answer, and so appeared by the note itself, that it was given to Ritenour, the plaintiff. But if in this respect the instruction had been accurate, it would still have been liable to the objection that it did not correctly state the law. It loses sight of an important element of the case, to wit, that the plaintiff had surrendered a valid and subsisting demand against Julian, which was of itself a sufficient consideration for the note. *Millard v. Porter*, 18 Ind. 503.

The only objection made to the instruction given by the court is, that it gives the law as it was expressly decided by this court in the case of *Millard v. Porter*, *supra*. What we have said concerning the instruction asked by the defendant, we think, sufficiently meets that objection. Authorities might be cited almost without limit in accord with *Millard v. Porter*, and the books will be searched in vain for anything in conflict with it. It rests upon a principle of the law of contracts which is elementary, entering into the very definition of consideration.

Judgment affirmed, with costs.

B. F. Gregory and *J. Harper*, for appellant.

J. McCabe and *J. M. Thompson*, for appellee.

Kinney v. Blythe.

KINNEY v. BLYTHE.

PRACTICE.—*Supreme Court.—Preponderance of Evidence.*—Where the Supreme Court finds evidence to support the finding, it will not go beyond this to determine the preponderance of the evidence.

SALE.—*Fraud.—Agent.*—On a sale of goods it was agreed that the buyer should give to the seller, in payment, upon delivery of the goods, notes of solvent persons. A certain note so given was not such as the contract thus called for, and the buyer knowing this, fraudulently deceived the seller's agent to whom he delivered the note, knowing him to be such agent and knowing that the proceeds of the sale were to go to, and become the property of, the agent, who, on discovering the deceit, offered to return the note to the buyer and demanded of him other good notes. There being evidence of these facts in a suit by the seller against the buyer, the plaintiff bringing the note into court and offering to return it to the defendant; there was a finding for the plaintiff in a certain sum, and that the defendant be entitled to withdraw the note from the files of the court and hold it as his own.

Held, that the finding was correct.

APPEAL from the Jackson Common Pleas.

The appellee filed his complaint, consisting of two paragraphs, against the appellant.

The first paragraph is an ordinary statutory count for goods sold and delivered, with a bill of particulars.

The second paragraph is, substantially, as follows: "That on the 8th day of January, 1867, plaintiff, at defendant's request, sold and delivered to him all his saloon liquors, bottles, casks, &c., then on hand, and of the value of \$806.45; for which defendant agreed to let plaintiff have, in payment, notes of good, solvent parties of Salem, Indiana, payable on the 1st day of March, 1867, which plaintiff agreed to accept; that in pursuance of said contract, defendant took possession of said property, and in a few days thereafter delivered to plaintiff's father, who was authorized by plaintiff to act for him in the premises, a note for \$675, on one E. H. Logan, whom defendant falsely and fraudulently represented to be perfectly solvent, and worth in real estate not less than ten thousand dollars, in part payment for said

property; that neither plaintiff nor his father knew anything about the pecuniary circumstances of said Logan, but wholly relied upon defendant's said false and fraudulent representations; that previous to that time plaintiff had authorized his father, William D. Blythe, to receive from defendant the notes by him to be given to plaintiff, as agent for said plaintiff, and then to apply any notes so received in payment *pro tanto* of the indebtedness of said plaintiff to said William D. Blythe; that plaintiff's said father received the said note from the defendant in payment in part of the plaintiff's indebtedness to his father; that, in truth and in fact, said Logan was not and is not solvent; that he has not and had not, at that time, any real estate; that, on the contrary, the said Logan was and is wholly insolvent, and has no property of any kind out of which plaintiff can or could make his money; that plaintiff's father, as agent aforesaid, before the commencement of this suit, on learning that said Logan was insolvent as aforesaid, tendered said note back to defendant, who refused to accept the same; that plaintiff's father then returned said note to plaintiff and refused to apply the same on plaintiff's indebtedness to him; that defendant, at the time he made said representations of the solvency of said Logan, knew that the same were false in every particular, but designing to cheat and defraud plaintiff out of his said property, made said false and fraudulent representations; that plaintiff now brings into court said note, and offers to surrender it up to defendant; that said defendant has refused to let plaintiff have any other notes, although often requested so to do."

The appellant filed his answer, as follows: A general denial, together with an agreement entered of record, "that both parties may give in evidence all matters that could be given in evidence under any proper plea that might be pleaded herein."

The cause was submitted to the court for trial, and there was a finding for the appellee for the sum of \$707.62½; and that the appellant should be entitled to the possession and

Kinney v. Blythe.

ownership of the note in the complaint mentioned, and be entitled to withdraw the same from the files of this cause and to have and hold the same as his own.

The appellant moved for a new trial, and the motion was overruled.

RAY, J.—We are asked to reverse this case upon the evidence.

There was proof that the appellant was to give in payment “notes of good, solvent parties of Salem, Indiana; notes that could be cashed at Salem at any time.”

These notes, by a reasonable construction of the contract, were to be delivered on the delivery of the saloon to the appellant. Certain notes were delivered, and there was evidence from which the court could find that they were not such notes as the contract called for, and that the appellant knew this fact and fraudulantly deceived William H. Blythe, who was acting for his son in the sale of the saloon, and that new notes were demanded before suit was brought.

The plaintiff’s agent below stated, that “when I saw the way it was assigned, I told Kinney I wanted him to take it back and give me good paper.” This was sufficient. The appellant knew that the proceeds of the sale were to go to him, and that he was acting as agent for his son in the trade.

All this is denied, but we find evidence which will support the finding, and we cannot go beyond this to determine the preponderance of the evidence.

No other questions are discussed for the appellant.

Judgment affirmed, with costs.

J. B. Brown, for appellant.

W. K. Marshall, J. M. Bills, and *W. A. Sipe*, for appellee.

The Indianapolis and Cincinnati Railroad Company v. Paramore.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v. PARAMORE.

31	143
141	664
31	143
154	333

RAILROAD.—Negligence.—Pleading.—Where the owner of a quantity of cordwood deposits the same at a certain place near a railroad track, in accordance with the direction of an agent of the railroad company and under an agreement with such agent by which it is to become the property of the railroad company when measured and paid for by the company, but until so measured and paid for to remain the property of such owner, and while so remaining his property it is consumed by fire originating from a locomotive engine in the use of the company and caused by the negligence of the employees of the company, and these facts are averred in the complaint in a suit by such owner against the company to recover the value of the wood; it is not necessary to allege also the destruction of the wood without the fault or negligence of the plaintiff.

SAME.—Burden of Proof.—It is the duty of a railroad company to use machinery properly constructed with a view to prevent fire from being communicated to property lawfully placed by the owner thereof near the railroad track, and the engines should be operated with care and skill to the same end. If fire is communicated to such property from an engine by reason of a failure to use proper preventives, or by the carelessness of employees, the company is liable for the consequences; but negligence in either respect should not be inferred without proof, the burden of which rests on the party alleging it.

SAME.—Watchman.—The railroad company is not bound to provide a watchman to protect property so placed by the owner, at his own instance, without any contract with the company, in danger of taking fire by unavoidable accident from the engines used by the company.

APPEAL from the Decatur Circuit Court.

ELLIOTT, C. J.—Paramore, the plaintiff below, recovered a judgment against the railroad company, from which the latter appeals.

It appears from the record that the recovery was had upon either the second or third paragraph of the complaint. Demurrers to these paragraphs were overruled; and this ruling presents the first question in the case. The averments are substantially the same in each. We state the facts as they are presented by the third paragraph. It alleges, that the railroad company, by its agent, contracted and agreed with the plaintiff that if he would deliver on

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the line of the company's railroad track, at or near the town of New Point, in the county of Decatur, and at such places as were indicated by such agent, a quantity of cordwood for the use of the company, that the latter would, at reasonable times, and at least once a month, measure and pay for the same a fair cash price; that in pursuance of said contract, and in accordance with the instructions of said agent, the plaintiff did, in September, 1865, deliver as directed, one hundred and twenty cords of wood, of the value of five hundred dollars, of which the defendant had notice. Yet the defendant failed and refused to measure said wood, for a long time, to wit, for more than one month; and that before the same was measured, it was totally burned up and destroyed by fire, originating from a locomotive engine of the defendant, and caused by the fault, carelessness, and negligence of the employees of the defendant, &c.

The first paragraph is on contract for wood sold and delivered to the railroad company. The second and third are treated by counsel of both parties, in this court, as paragraphs in *tort*, resting on the allegation that the agents and employees of the railroad company, in charge of the locomotive, by carelessness and negligence in running the same, set fire to and thereby destroyed the plaintiff's wood; and the objection urged to their sufficiency is, that it is not averred that the wood was destroyed without the fault or negligence of the plaintiff. A contract between the parties in reference to the wood, and its delivery on the line of the railroad under the direction of the defendant's agent, are clearly alleged, as well as the failure of the defendant to measure and pay for the wood within the time limited, and no substantial objection to them as paragraphs on contract is apparent. But assuming that it may be inferred that, under the alleged agreement, the wood remained the property of the plaintiff until it was measured and paid for, and before that was done it was destroyed by fire caused by the carelessness and negligence of the servants and employees of the railroad company in running its locomotive on the

track of its road, we think the averments are sufficient to exclude the idea that any negligence on the part of the plaintiff contributed to the result. It cannot be inferred from the facts alleged that the plaintiff was in any wise an actor in the matter of the fire. It is averred, that he deposited the wood on the line of the railroad under the direction of the defendant's agent. He had no connection with, or charge over, the locomotive from which it is alleged the fire originated. The injury was not to him personally, but to his inanimate property, and, for aught that appears, in his absence; and it is averred, that the injury was caused by the negligence and carelessness of the defendant's servants and employees. It is very dissimilar to a case where the action is brought for a personal injury to a passenger on a train, or to one, not a passenger, who is struck or run over by a passing train, in which the plaintiff is necessarily present and an actor, and where his own negligence may readily contribute to the injury.

The cause was tried by a jury. After the verdict for the plaintiff was returned, the railroad company filed a motion in writing for a new trial, which the court overruled. One of the reasons urged for a new trial was, that the verdict of the jury was contrary to the evidence.

Overruling the motion for a new trial is assigned for error.

The evidence is before us, from which it appears that the railroad company had a wood-shed at New Point one hundred feet long, on the north side of the track, and on the north of the shed an open space used as a wood-yard, on which was ricked, in the fall of 1865, about one thousand cords of wood, part of which belonged to the company, and the residue to several other persons. The ricks extended to near the shed, leaving a wagon way between the wood and shed. Paramore, the plaintiff below, in the fall of 1865, (finishing it sometime in November) hauled and ricked up in said wood-yard one hundred and three cords of wood.

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which he intended for the railroad company, but had no contract with it for the sale of the wood. A number of persons, including the plaintiff, had frequently hauled and ricked wood there, and when the company needed it for use the amount desired was measured and paid for; but until that was done it remained the property of those who furnished it. The plaintiff's wood in controversy was deposited there in the same manner, and had not been measured, received, or paid for by the company, when, on the 6th of January, 1866, the wood-shed accidentally caught fire and burned down. The fire was communicated from the shed to the wood, the greater part of which, including all the plaintiff's, except about fifteen cords, was burned up. The plaintiff himself testified, that he had no contract with the company under which the wood was delivered; that he had been putting out wood ever since the road was built, and never had a contract with the company. And the jury found specially, that the wood was the property of the plaintiff, Paramore, when it was burned up. So that the recovery must be sustained, if at all, on the ground that the fire was caused and communicated to the wood by the carelessness and negligence of the company's servants and employees.

The evidence does not show how the fire originated. A quantity of dry wood had been sawed and piled up at the south side of the shed, close to the track, for the use of passing trains. The fire was first discovered in this pile of wood, which was then burning rapidly, but it communicated immediately afterwards to the shed, which was of light, dry material. The day was dry and windy, and the flames spread with great rapidity, and in a very short space of time the whole shed presented a sheet of flame, which it was impossible to arrest. The agent of the company, whose office was but a short distance from the wood-shed, gathered together fifty or sixty hands, as soon as possible after the fire was discovered, who used every possible effort to save the wood, but the greater part of it was burned.

It might, perhaps, be inferred that the fire originated, in some way, from a locomotive; but the only evidence from which such an inference can be drawn is, that two trains, one a passenger and the other a freight train, had passed that point but a short time before the fire was discovered. But if it is inferred the fire thus originated, still there is not a particle of evidence to show that it was caused by any defect or imperfection of the machinery, or by any want of care or prudence on the part of those having charge of the trains, unless such negligence is to be inferred, *prima facie*, from the fact of the fire, thus throwing on the defendant the burden of disproving negligence, without any affirmative evidence to establish its existence. The American cases, except in those states where it is regulated by statute, seem generally to concur in holding, that no such inference can arise from the fact alone that a fire is thus produced. See Redf. Railw. § 125,5, and cases there cited; *Terry v. The N. Y. C. R. R. Co.*, 22 Barb. 574; *Rood v. N. Y. & Erie R. R. Co.*, 18 Barb. 80; *Field v. N. Y. C. R. R. Co.*, 32 N. Y. 339.

The use of such engines in operating railways is authorized by law, and why should the presumption of negligence arise from the fact of fire being communicated by them? It will scarcely be denied that they are liable, unavoidably, to communicate fire, especially during very dry periods, to combustible matter near the track; and we see no reason why the mere fact that a fire is thus caused should raise the presumption of negligence. It is undoubtedly the duty of railroad companies to use machinery that is properly constructed with a view to prevent fire from being thus communicated, and the engines should be operated with care and skill to the same end. And if fire is communicated by an engine, caused by a failure to use proper preventives, or by the carelessness of employees, the company is liable for the consequences; but as negligence, in either respect, involves a wrong, it should not be inferred without proof, the burden of which rests upon the party alleging it.

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It is however insisted on the part of the appellee, that it was the duty of the railroad company, under the circumstances, to have kept a guard, or watchman, constantly stationed at the wood-shed to guard against accidents by fire; and that a failure to do so was such culpable negligence as to render the company liable. It appears from the evidence that the fall and forepart of the winter of 1865 was an unusually dry season, and that, in some way, fire was communicated to the roof of the wood-shed, on at least two occasions, but was extinguished without injury, and the company thereafter kept a watchman stationed there, until within a week or ten days of the time the wood was burned, when a change occurred in the weather; it rained, and perhaps snow fell, and the watch was discontinued. It subsequently became dry again, and the fire occurred on a dry, windy day.

The plaintiff at the time of hauling the wood to the yard was fully aware of the danger from fire, and knew that fire had been, and was liable to be, communicated to the shed, and in depositing his wood there, assumed the risk of its being burned by unavoidable accident, to which the place rendered it liable; not as is claimed by the appellant's counsel, that he was thereby guilty of such negligence as to bar a recovery for its destruction by the negligence of the railroad company or its employees. That was the proper place to deposit the wood for market, and whilst in doing so the plaintiff assumed the risk of its being burned by unavoidable accident, he was not thereby guilty of negligence; and if the fire was communicated to it by the negligence of the company or those in its employ, the company would be liable. It was the duty of the company to use reasonable precaution by providing properly constructed machinery, and the duty of its servants to use reasonable care and diligence in its use, to avoid the communication of fire to the shed and wood; but no reason is perceived why the company was under any more obligation than the plaintiff to be at the expense of keeping a watchman stationed there,

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to protect the shed and wood and extinguish any fire that might be kindled by unavoidable accident. Every proprietor adjoining a railroad may lawfully deposit his property or goods or erect valuable buildings on his own premises, in close proximity to such road; but in doing so he takes upon himself the risk of danger of fire being communicated thereto without the fault of the railroad company or its servants. And the existence of such danger does not impose on the company any obligation to incur the expense of a guard. The establishment of such a principle would require railroad companies to station guards along the whole line of their roads.

The principle applicable to such cases is, that a party in the exercise of his legal rights must use reasonable and proper care to avoid injury to others. But if such care be exercised, and an injury unavoidably results to others, no liability attaches. *Clark v. Foot*, 8 Johns. 421; *Panton v. Holland*, 17 Johns. 92; *Thurston v. Hancock*, 12 Mass. 220; *R. R. Co. v. Yeiser*, 8 Penn. St. 366.

We think a new trial should have been awarded.

Judgment reversed, with costs, and the cause remanded for a new trial.

U. J. Hammond and *L. Howland*, for appellant.

J. Gavin, *J. D. Miller*, *B. W. Wilson*, and *W. H. Carroll*, for appellee.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v.
STARK and Another.

APPEAL from the Decatur Circuit Court.

ELLIOTT, C. J.—This was a suit against the railroad company to recover the value of a quantity of wood destroyed

The Ohio and Mississippi Railroad Company v. Shultz.

by fire at New Point, in Decatur county. The facts in the case and the questions presented are substantially the same as in the immediately preceding case of the same railroad company v. *Paramore*, and the judgment is reversed for the same reasons given in that case.

Judgment reversed, with costs, and the cause remanded for a new trial.

U. J. Hammond and *L. Howland*, for appellant.

B. W. Wilson, J. Gavin, J. D. Miller, and W. H. Carrol, for appellees.

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152 101

THE OHIO AND MISSISSIPPI RAILROAD COMPANY v. SHULTZ.

JURISDICTION.—*Collateral Proceeding.*—It is well settled, that the proceedings of courts of inferior jurisdiction will be deemed of no validity unless their jurisdiction is affirmatively shown.

PRACTICE.—*Supreme Court.*—This court will not, ordinarily, reverse a correct judgment merely because the court below may have acted upon a bad reason.

APPEAL from the Knox Circuit Court.

FRAZER, J.—This was a suit (originating before a justice of the peace) by the appellee against the appellant, to recover for work and labor. The defense was, that the appellant had been compelled, as garnishee in a suit before a justice of the peace in Ohio against the plaintiff, to pay the indebtedness there. Without first showing that, according to the laws of Ohio, the magistrate there had jurisdiction of the matter, or that the particular cause had been brought within his cognizance by such notice as the laws of that State may require, a transcript of the proceedings was offered in evidence and excluded. This ruling presents the only question here, and from the appellee we have no argument upon it. On behalf of the appellant there comes

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no question as to the intrinsic correctness of the ruling below, but it is said that the objection made below to the transcript as evidence was not based upon the matter of jurisdiction, and that if it had been, the necessary evidence to obviate the objection might have been produced. The bill of exceptions, however, fails to sustain this statement, it being silent as to the particular reason urged by counsel or acted upon by the court as the foundation of the objection. Nor is this, perhaps, important. This court will not, ordinarily, reverse a correct judgment merely because the court below may have acted upon a bad reason.

It is certain that there was no error in the ruling. It is well settled, that the proceedings of courts of inferior jurisdiction will be deemed of no validity unless their jurisdiction is affirmatively shown.

Judgment affirmed, with costs.

W. E. Niblack, W. H. De Wolf, and T. Gazlay, for appellant.

J. S. Pritchett and O. F. Baker, for appellee.

CURRY v. BAKER, Governor.

AFFIDAVIT.—*Contest of Election.*—The affidavit of an elector instituting a contest of an election, under the act of May 4th, 1852 (1 G. & H. 316), requiring of such contestor "a written statement specifying the grounds of contest, verified by the affidavit of such elector," is not bad for qualifying the averment of the truth of such statement by the words, "as he is informed and verily believes."

APPEAL from the Marion Civil Circuit Court.

RAY, J.—Curry filed his affidavit in the Marion Civil Circuit Court, setting forth, substantially, the following facts:—

That at the last general election in the State, in October, 1868, a clerk of the Circuit Court of Boone county, in said

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State, was required to be elected; that said Curry was eligible to said office of clerk of said Boone county; that the only persons voted for for said office at said election were said Curry and one Abram O. Miller; that the aggregate number of votes cast at said election were 4,950, of which said Curry received 2,487, and said Miller 2,463, said Curry receiving a majority of all the votes so cast for said office, of twenty-four votes; that on the 15th day of October, 1868, the board of commissioners of Boone county declared the result of said election as aforesaid, and that said Curry was duly elected clerk of said county of Boone; that afterward the result of said election was duly certified by the clerk of the Circuit Court of said county of Boone, and transmitted to the Secretary of State of the State of Indiana, who received the same and filed it the office of Secretary of State aforesaid, in conformity to law in such cases made and provided; that after the said certificate of the result of said election was so filed in said office of the Secretary of State, said Curry, on the 17th day of November, 1868, at the office of the Governor of said State, demanded of him as such Governor, a commission for the said office of clerk of the Circuit Court of said Boone county, which was refused, said Conrad Baker being then and there such Governor and the person of whom such demand was made. Said Curry further alleged, that the term of said present incumbent of said office of clerk had expired; and said incumbent is now holding said office to await the qualification of his successor.

Upon this statement, which was sworn to, said Curry moved the court for a mandate against Governor Baker directing him to issue a commission to said Curry as such clerk for the term of four years.

The court made an order directing that the Governor show cause, on or before the 12th day of December, 1868, why he will not issue a commission to said Curry as clerk, &c. Afterwards, on the 9th day of December, 1868, Gov-

ernor Baker filed an answer showing cause. This answer contained substantially the following facts:—

That within ten days after the 15th day of October, 1868, Abram O. Miller, the competitor of said Curry for said office, filed in the auditor's office of said Boone county, his statement in writing, specifying the grounds upon which he intended to contest the election of said Curry, which statement was verified by said Miller, who was, at the time of filing his said statement, and at the time of said election, a qualified elector of said Boone county; that the said auditor gave notice to the clerk of said county that the election of said Curry was contested, to which was attached a copy of said statement of the contestor, Miller; which notice and copy of said statement was on the same day, to wit, October 21st, 1868, filed in the clerk's office of said county of Boone, and still remains on file therein; that the only certificate of the result of the election transmitted to the Secretary of State by the clerk of Boone county was received by said Secretary on the 31st day of October, 1868; and the Governor makes two papers so transmitted part of his answer. One of these papers is a certificate of the result of said election in respect to the entire ticket, and shows that Israel Curry received for clerk 2,487 votes, and Abram O. Miller 2,463 votes. The other of said papers, which the Governor makes "exhibit B" to his answer, is a copy of the notice of the auditor of said Boone county to the clerk thereof that said election was contested by said Miller, and containing a copy of the statement of the grounds of the contest of said election. This statement, if true, shows facts sufficient to entitle Miller to the office of clerk of said Boone county, as having been duly elected thereto at said election. There is appended to said statement an affidavit in the following words:—

"Abram O. Miller swears that the foregoing statement and grounds for contesting the said election of said Israel Curry to said office of clerk of the Circuit Court of Boone

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county aforesaid are true in substance and matter of fact, as he is informed and verily believes.

(Signed.) ABRAM O. MILLER."

The Governor further says, that he had never received any information that the contest of said election had been dismissed, decided, or otherwise terminated; but the truth is, the board of commissioners of Boone county decided said contest against said Curry and in favor of said Miller; and said Curry subsequently appealed from their decision to the Boone Circuit Court, in which said appeal is still pending, undecided and undetermined; and that he can not issue a commission to said Curry or Miller pending said contest.

This answer was duly subscribed and sworn to before the clerk of the court below.

The plaintiff demurred, "because the said return and answer do not state facts sufficient to constitute a defense to this action; nor do they show any sufficient reason why the mandate herein should not be made peremptory."

The court overruled this demurrer. The plaintiff excepted, and being ruled to reply, failed, and suffered judgment on demurrer.

The plaintiff now appeals; and the only error complained of is the overruling of the demurrer to the return.

The only question we are asked to consider is as to the sufficiency of the affidavit upon which the contest of the election rests.

One of the fundamental rules of construction, when applied to a statute, requires that effect shall be given to the law.

The act under which this contest has been commenced is entitled, "An act to provide for contesting the election to any state, district, circuit, county, or township office." The act requires of the elector instituting the contest "a written statement specifying the grounds of contest, verified by the affidavit of such elector."

The grounds of contest are, "*First.* For malconduct

of any member or officer of the proper board of judges or canvassers.

"Second. When the contestee was ineligible.

"Third. When the contestee, previous to such election, shall have been convicted of an infamous crime; such conviction not having been reversed, nor such person pardoned at the time of such election; or,

"Fourth. On account of illegal votes."

It is very plain that if the contest was of a State election, where the conduct of the board of judges or canvassers at each particular precinct was involved, or was instituted on account of illegal votes received at any number of the thousand precincts open on one special day, it would be impossible for any one contestor to make any statement of facts from his own personal observation, extending over so wide a field, limited to a given moment of time, and yet required to be specific in detail and locality. To construe the language of the statute, therefore, as is contended by the appellant, and require the affidavit to be founded alone upon the personal observation of the contestor, would involve a practical change in the title of the act, so that it should read, an act to prohibit the contesting of any election.

It is never the duty of courts to place so rigid a construction upon the language of any act, where there is room for interpretation, as to defeat the purpose of the legislature. Still less are we disposed to adopt such a view where the object of the law is to secure to the electors the purity of the ballot-box, by subjecting to the scrutiny of the courts the conduct of the officers in charge of the election.

The statute requires that the statement specifying the grounds of contest shall be verified by the affidavit of the elector; that is, literally, made out to be true by such affidavit. No statement can go beyond the belief of the party making it. That belief may arise from personal observation, from sight or from sound, from information derived from others, or as the result of a logical conclusion from

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other known facts. But we know that sight or sound may deceive, as information derived from other persons may mislead. They can, at most, when united, produce but one result, conviction of the mind, or in other words, belief. When, therefore, one states his belief in the truth of a statement, the assertion is as strong as language can make it. Without the proper evidence to produce a conviction, he can have no belief on the subject; and the mind can receive nothing beyond a conviction of the truth. At common law, certain pleas concluded with a verification—an assertion of the ability of the pleader to prove the matter alleged. *Wilkes v. Hopkins*, 6 Man. & G. 36, note (c). In the affidavit before us, the affiant states his information as a source of his belief, but he does not rest there; the truth of the statements are asserted as he “verily believes.” The assertion of his belief is direct and positive, and renders the affidavit conclusive. *Simpkins v. Malatt*, 9 Ind. 543; *Trew v. Gaskill*, 10 Ind. 265; *State v. Ellison*, 14 Ind. 380; *McNamara v. Ellis*, *Id.* 516.

The judgment is affirmed, with costs.

S. Claypool, Huff & Langdon, and *Hamilton & Galvin*, for appellant.

J. W. Gordon, W. March, and *D. E. Williamson*, Attorney General, for appellee.

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132	239
31	156
140	459
31	156
157	190

 WALPOLE'S Administrator v. BISHOP and Another.

PARTIES.—*Decedents' Estates.*—The heirs at law of a decedent against whose estate it appears there exist any debts cannot maintain an action for money due the estate.

SAME.—Suit by the heirs at law of A. against the administrator of B., to recover money collected by B. in his lifetime, as attorney of A. The complaint alleged, that, in the same year that A. died, an administrator of his estate was appointed, who six years afterwards resigned his trust; that no assets ever came to his hands; that no claims against A's estate were ever

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filed in court; that no other administrator of A.'s estate was ever appointed; that the widow of A. paid all the claims that were presented or that she knew existed against his estate, and fully administered the same, years before.

Held, that these plaintiffs could not maintain the action.

INTEREST.—*Money Collected by Attorney.*—*Demand.*—*Conversion.*—An attorney is not liable for interest on money collected by him, until demand made by the party entitled to receive it, or until a wrongful conversion.

APPEAL from the Marion Common Pleas.

GREGORY, J.—This is a suit by the heirs at law of John Bishop, deceased, against Walpole's administrator, to recover money collected by Walpole in his lifetime, as attorney of Bishop. The complaint alleges, that Bishop died in 1856; that one Durham was in that year appointed his administrator; that he resigned his trust in 1862; that no assets of any kind ever came to his hands; that no claims against Bishop's estate were ever filed in court; that no other administrator had ever been appointed; that the widow of Bishop paid all the claims that were presented or that she knew existed against his estate, and fully administered the same, years since.

A demurrer was filed to this complaint, on the grounds, first, that it does not state facts sufficient; second, that there is a defect of parties plaintiffs.

The demurrer was overruled, and the defendant excepted.

The defendant filed the general denial. The issue was tried by the court; finding for the plaintiff for three hundred and sixty-four dollars.

The evidence, which is a part of the record, shows that a judgment was rendered in the Marion Common Pleas, on the 10th of January, 1855, in favor of Bishop against one Van Houten, administrator of Moore, for four hundred dollars; that two assignments of parts of the judgment, of one hundred dollars each, had been made by Bishop to Walpole. Van Houten, the sole witness in the case, testified, that he was and still is the administrator of Moore's estate, and was the defendant in the judgment read in evidence; that Walpole was the attorney for Bishop in the action; that Bishop

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made the assignments to Walpole to pay the latter for fees as an attorney; that Bishop died in the spring of 1856; that the plaintiffs, Sarah and Lewis Bishop, are the only heirs of Bishop, deceased; that Sarah Bishop, the widow, settled and paid the debts of decedent; that there is no administrator of Bishop's estate; that in June or July, 1856, he paid to Walpole as Bishop's attorney a part of the judgment; that on the 31st of December, 1856, he paid Walpole \$285.45, being the balance of the judgment and interest, including one or two small claims in favor of one McLeary against Moore's estate; that he took Walpole's receipt therefor, which he produced; that Sarah Bishop frequently asked and urged him, as administrator of Moore's estate, to pay the judgment referred to; that he always gave her an evasive answer, requesting her to wait till the Charley Garner case was settled, that he thought there would be more coming to her; that he never told Mrs. Bishop or Lewis Bishop that he had paid the judgment in full to Walpole, and had every reason to believe that neither of the plaintiffs ever knew it was paid until they learned it by the receipt filed as voucher ninety-one in his report as Moore's administrator, at the October term, 1867, of said court; that the reason he never told Mrs. Bishop it was paid was, because she was easily troubled and very often became sick from trouble.

The first question is, can the heirs at law of Bishop maintain this action?

It is claimed, that under sections three and four of the code (2 G. & H. pp. 34-5-6-7), the heir may sue, being the real party in interest, after the payment of debts. There is no averment in the complaint that there are no debts or liabilities for the expenses of administration, but, on the contrary, it is alleged, that administration was granted to Durham in 1856; that he continued to be administrator until he resigned his trust in 1862; and that no assets of any kind ever came to his hands. His expenses, at least, are a charge on the estate. The averment that Mrs. Bishop, the widow, paid all the claims that were presented, or that she

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knew existed against her husband's estate, is not an averment that there are no such debts. She was never the administratrix of the estate; she therefore never had it in her power fully to administer it.

Upon the death of Bishop, his personal estate vested in his administrator, and not the heirs at law. Walpole's liability was to the administrator, and not the heirs. He was under no obligation to account to the heirs for the money collected by him as the attorney of the decedent. An action cannot be maintained by them against his administrator.

There is nothing shown in evidence that makes Walpole's estate liable for interest. An attorney is not liable for interest on money collected by him, until demand made by the party entitled to receive it, or until a wrongful conversion. There is no proof of either in this case. The act of Van Houten in not telling a nervous woman a fact that would have troubled her or made her sick could hardly be charged to Walpole. Indeed, it is somewhat difficult to understand upon what principle the court below proceeded in charging Walpole's estate with interest on the money collected by him as the attorney for Bishop.

Judgment reversed, with costs; cause remanded, with directions to sustain the demurrer to the complaint, and for further proceedings.

J. S. Harvey, for appellant.

J. Milner, for appellee.

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STEBBINS v. GOLDTHWAIT and Another.

PLEADING.—*Decedents' Estates.*—*Promissory Note.*—*Abatement.*—Where the assignee of a promissory note, to whom it has been indorsed in blank by the

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payee, dies, intestate, and, there being no administration upon his estate, his widow, the note not having been made her property, assigns and indorses it in blank, and, the intestate having been largely indebted at the time of his death, his debts remain unpaid; or where, in addition to these facts, the maker holds a claim against the estate of the decedent, which in a suit by his administrator would be a proper set-off; in an action against the maker by one to whom the assignee of the widow has indorsed the note in blank, upon the note as if indorsed by the payee to the plaintiff, an answer, verified by affidavit, setting forth these facts and praying that the suit abate is good on demurrer.

SAME.—General Denial.—An answer of general denial not sworn to would not, under our code, put the plaintiff upon proof of the genuineness of the indorsement as shown by the complaint, or admit evidence of the facts set up in such answer in abatement.

APPEAL from the Grant Common Pleas.

FRAZER, J.—This suit originated before a justice of the peace. It was upon a promissory note made by the appellant, payable to one S. B. Campbell, and indorsed in blank by Campbell, and M. Stebbins, and George W. Stebbins. In this condition the note was filed as a complaint before the justice. When the cause came to the court of common pleas by appeal, a formal complaint was filed upon the note as if indorsed by Campbell to the plaintiffs, now appellees, and showing copies of the note and such an indorsement. The defendant then answered in two paragraphs verified by affidavit: First, that Campbell by indorsement assigned the note to one Jeremiah B. Stebbins, who afterwards and while holding the note died, intestate; that there was no administration upon his estate, nor was said note in any manner afterwards made the property of M. Stebbins, his widow; nevertheless, she assigned and indorsed the note to one George Stebbins, who assigned it to the plaintiffs; that Jeremiah B. Stebbins was largely indebted at the time of his decease, and his debts remain unpaid; wherefore the defendant prayed that the suit abate and be dismissed. Second, alleging substantially the same facts as the first, and also, that the defendant holds large claims against the estate of Stebbins, deceased, which in a suit by his administrator would be proper set-off, wherefore the defendant prayed that the

suit abate. A demurrer was sustained to each of these answers, and it is claimed that these rulings were erroneous.

Upon the trial, the court gave leave to the plaintiffs to strike off of the note the indorsed names, "M. Stebbins" and "George W. Stebbins," and to write above the name of Campbell an assignment to themselves; to which the defendant excepted, and he now questions the correctness of that ruling here.

The note thus indorsed was the only evidence offered, and it was admitted over the defendant's exception. After a finding for the plaintiffs, a motion for a new trial was overruled and a judgment rendered on the finding.

It is not pretended, on behalf of the appellees, that the facts pleaded were not a sufficient defense, but it is argued that the general denial which was in by statute (the case having originated before a justice of the peace) authorized the same proof. Such is not our opinion. The general denial not sworn to, would, under our code, have raised no question as to the genuineness of the indorsement as shown by the complaint, and would not, therefore, have put the plaintiffs upon proof of it, or admitted the evidence of the facts set up in the answer.

Reversed, with costs, and remanded, with directions to overrule demurrer.

J. Brownlee, for appellant.

A. Steele and *R. T. St. John*, for appellees.

Coy and Others v. STUCKER and Others.

CONTRACT.—*Practice.*—*Parties.*—Written agreement as follows: "Whereas there is an action now pending in the Bartholomew Common Pleas Court wherein A. is plaintiff and the undersigned and others are defendants,

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144	161
146	97

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153	683

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wherein said A. sues for money expended by said A. at their request in obtaining recruits under a call made by the President of the United States; and whereas the *undersigned* are desirous of compromising said cause and paying to said A. whatever sum may be found due him; and whereas B., C., and D. are trying to compromise said cause and ascertain the sum due to said A., in order to pay the same to him; now, therefore, we, *the undersigned*, agree to and with said B., C., and D. that if they should compromise said cause and ascertain the amount due to said A., upon any compromise they may make, to pay to said parties or to said A. the proportional interest due from each of the undersigned as the ascertained amount due to said A.; and should said B., C., and D. agree upon the amount due to said A. and pay the same to him, or in any way satisfy the same, each of the undersigned promise and agree to pay to him the proportional amount due from them, and severally promise to pay their several proportions of said amount that may have been so paid to said A., without relief from valuation or appraisement laws, and agree to indemnify them against all loss or damage in any way in making said compromise; and said B., C., and D. are left to compromise said cause in such manner as they may think best." Suit on this agreement against the signers thereof by B., C., and D., alleging a compromise by them with A. by giving him their note for a certain sum, which B. had paid with his own funds, &c.

Held, that the defendants were properly joined in the same action.

RELEASE.—The fact that defendant E. paid a certain portion of a judgment against the plaintiffs on said note, and defendants E. and F. became replevin bail on such judgment, upon the agreement of B. to release E. and F. from liability upon the contract in suit, was a good defense as to E. and F., but not available as to the other defendants.

SAME.—The release by the plaintiffs of any one originally liable in the action pending when the written contract was made, but not a party to such contract, could not avail as a defense to this action.

PAROL EVIDENCE.—*Contradiction of Written Contract.*—It could not be set up in defense to such suit on said agreement that there were other parties defendants in said action by A. than those who signed the agreement, and that plaintiffs agreed to get all said defendants to sign it, and failing to do so the agreement was to be void, and that it was upon that express condition it was delivered to plaintiffs.

PLEADING.—*Partial Defense.*—Answers by certain of the defendants alleging that the indebtedness, to compromise which the contract in suit was executed, was one in which the plaintiffs were equally involved with the defendants, and pleading certain payments made by these defendants, and asking that they might be considered in fixing the final liability.

Held, that the answers were good to the extent and purpose for which they were pleaded.

COMPROMISE.—*Doubtful Question of Law.*—Answer by one of the defendants that there was a doubtful question of law as to his liability under the con-

Coy and Others v. Stucker and Others.

tract in suit, and that a compromise was therefore made and a less sum given in discharge of a greater liability.

Held, that the answer was bad.

APPEAL from the Bartholomew Circuit Court.

RAY, J.—The appellants, Samuel Coy, William G. Whitcomb, and William T. Lee, sued Jephtha P. Stucker, John Long, Joseph Miller, William Gailey, William Long, John R. Lee, Hezekiah Wells, Benjamin F. Neville, William Doyle, John Becker, William H. Betz, Edwin C. Jones, John H. Kennedy, Alexander Pruitt, James A. Kennedy, Thomas R. Reaves, James Barnhill, and John Cobb.

The agreement upon which this action is based reads as follows:—

“Whereas there is an action now pending in the Bartholomew Common Pleas Court, wherein Thomas J. Kennedy is plaintiff, and the undersigned and others are defendants, wherein said Kennedy sues for money expended by said Kennedy at their request in obtaining recruits under a call made by the President of the United States; and whereas the undersigned are desirous of compromising said cause and paying to said Kennedy whatever sum may be found due him; and whereas Samuel Coy, William T. Lee, and William Whitcomb are trying to compromise said cause and ascertain the sum due to said Kennedy, in order to pay the same to him; now, therefore, we, the undersigned, agree to and with said Coy, Lee, and Whitcomb, that if they should compromise said cause, and ascertain the amount due to said Kennedy, upon any compromise they may make, to pay to said parties, or to said Kennedy, the proportional interest due from each of the undersigned as the ascertained amount due to said Kennedy; and should Coy, Lee, and Whitcomb agree upon the amount due to said Kennedy, and pay the same to him, or in any way satisfy the same, each of the undersigned promises and agrees to pay to him the proportional amount due from them, and severally promise to pay their several proportions of said amount that may have been so paid to said Kennedy, without re-

lied from valuation or appraisement laws, and agree to indemnify them against all loss or damage in any way in making said compromise; and said Coy, Lee, and Whitcomb are left to compromise such cause in such manner as they may think best."

The first cause of action alleges, that in pursuance of said agreement, plaintiffs did compromise said action, by giving their note to said Kennedy for \$2,385.98, and that the said Coy had paid the same with his own funds, of all of which the defendants had notice.

The second cause of action is the same as the first, except that it avers, that Coy paid \$1,449.06 over and above all sums paid to himself, Kennedy, his co-plaintiffs, or any one else authorized to receive the money; that his co-plaintiffs had paid nothing; and avers notice and demand.

The point was made below and put in various shapes, that the agreement is a several one, binding the parties severally to pay only their proportional shares of the amount agreed upon by plaintiffs, and that therefore the defendants were improperly joined in the same action.

The first error assigned and considered by appellants is the action of the court on the demurrers filed to the second paragraphs of the several answers.

The second paragraphs of defendants' answers set up, that there were other parties defendants in said action by said Thomas J. Kennedy than those who signed said agreement; and that plaintiffs agreed to get all of said defendants to sign it, and failing to do so, the agreement was to be void and of no effect; and that it was upon that express condition and understanding that it was delivered to plaintiffs.

The third paragraphs of defendants' separate answers aver, that in consideration that the defendant John H. Kennedy would pay three hundred dollars on the judgment against plaintiffs on said note given to Thomas J. Kennedy, and that said John H. Kennedy and the defendants Neville and Pruitt would become replevin bail for the stay of execution on said judgment, said Coy agreed to release said de-

fendants Kennedy, Neville and Pruitt, from all further liability on said agreement; and that said three hundred dollars was paid by said Kennedy, and said parties did become said replevin bail.

Demurrers were overruled, not only to the answers of Kennedy, Neville, and Pruitt, but also to the answers of the other defendants, who claimed that the alleged release of Kennedy, Neville, and Pruitt released them also.

The fourth paragraphs of answer of Kennedy, Neville, and Pruitt are substantially the same as the third paragraphs.

Demurrers were overruled to these second, third, and fourth paragraphs of answer.

The contract, so far as it agrees to indemnify, is a joint contract, and the parties are bound by its terms to make good any loss sustained by the plaintiffs by reason of the insolvency of any one of said parties.

The second paragraph of the answer is in direct contradiction to the written contract, which asserts that the undersigned and others are defendants in the action pending in the Bartholomew Common Pleas Court. In the face of this express declaration in the contract, it will not be permitted that a parol agreement shall be set up, that the "others," were to sign the agreement before it should be binding upon the "undersigned."

It will not avail to cite decisions where parol evidence has been allowed to control the effect of an instrument in form a deed. The peculiar advantages possessed by the lender over the borrower and the legal forms under which the equitable rights of the mortgagor were sought to be smothered, compelled the court of equity either to yield her jurisdiction or break through legal forms and, disregarding technical scruples and difficulties, determine from proof whether a loan was the origin of the instrument, and if that were once established, to recognize and declare the equitable rights of the parties. But this "splendid instance," as Chancellor KENT styles it, "of the triumph of equitable prin-

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ciples over technical rules and the homage which these principles have received by their adoption in the courts of law," must not be relied upon to authorize parol evidence to be employed to contradict the express terms of contracts where no such relation of lender and borrower exists.

The demurrer should have been sustained to this paragraph.

The third paragraph of the answer was also bad. The liability as to each person was also several, the agreement being to pay in proportion to the share of each; and a discharge of John H. Kennedy, Neville, and Pruitt, therefore, could not work a discharge of the other defendants from their several liabilities. The answer was only good as to those who became replevin bail under the agreement. The third paragraph of the answer of John H. Kennedy, Neville, and Pruitt, to the same effect, was good.

The plaintiffs could make a valid contract to pay a consideration for replevin bail on the judgment, and the agreement therefore to release John H. Kennedy, Neville, and Pruitt, on their securing the postponement of the collection of the judgment and John H. Kennedy paying on the same the sum of three hundred dollars, was a good defense to the action in favor of the said Kennedy, Neville, and Pruitt, though not available as to the other defendants.

The fourth paragraph of the answer of said John H. Kennedy, Neville, and Pruitt, is also good, for the same reason.

The appellees also assign cross errors upon the sustaining of demurrers to the several pleas in abatement; but what we have already said as to the joint and several liability of the defendants under the contract sustains the action of the court below.

Demurrers were sustained to the fifth paragraphs of the answers of John Long, James A. Kennedy, William Long, Gailey, Lee, Wells, Becker, Betz, Jones, Reaves, Barnhill, and Cobb. That paragraph alleges, that the indebtedness, to compromise which the contract in suit was executed,

was one in which the plaintiffs were equally involved with the defendants, and pleads certain payments made and asks that they may be considered in fixing the final liability. We think the paragraphs good to the extent and purpose for which they are pleaded. The demurrer should have been overruled.

A demurrer was also sustained to the sixth paragraph of Benjamin F. Neville's answer. This ruling was correct. The plea was, that the payment of one hundred dollars discharged the liability. The contract was to pay the plaintiffs or Kennedy, upon the amount being fixed, and the breach of the contract therefore occurred then, and the payment of a less sum did not discharge the liability.

There is also a seventh paragraph of the answer of John Long which alleges, that there was a doubtful question of law as to the liability of the defendant under the contract; that a compromise was thereupon made and a less sum given in discharge of a greater liability. This paragraph was bad, as the construction of the written instrument in suit does not present a question of doubt authorizing a compromise of a given sum for a less. The eighth paragraph of Pruitt and John H. Kennedy's answer is bad, for the same reason.

There are other errors assigned in rulings upon demurrers, but we have already exhausted the abstract, as effectually as the appellees have exhausted language, which fortunately has limits, in the construction of the answers filed. We have been bewildered by the multitude of words, and, in doubt to which paragraphed mass the remark should apply, we make it to the answers in general, that the release by the plaintiffs of any one originally liable in the action pending when this contract was made, but not a party to the written contract, does not discharge the person so released from his liability to contribute his full share of such original liability upon the demand of the defendants in this action; and therefore such release cannot avail the defendants here.

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The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

S. Stansifer and F. Winter, for appellants.

F. T. Hord, for appellees.

HANLON v. WATERBURY.

WIDOW.—Partition.—Statute Construed.—Where in an action for partition there are several tracts of land in which a widow is entitled to an estate for life or in fee simple, and there are tenants in common with her in all or any part of such lands, the act of March 5th, 1859 (2 G. & H. 361), does not give her the absolute right to have her interest in several tracts located in a body, selected by her, on one of them, but confers on the commissioners acting under the direction of the court the *power*, where she has made such selection, to set over to her the tract so selected, if they deem it just and proper to do so. The tenants in common in the several tracts, in lieu of her interest in which she makes such selection, must be the same, and each one's interest must bear the same relative proportion in each tract to the interests of the other tenants.

SAME.—Estoppel.—Vendor and Purchaser.—An administrator, under an order of court granted upon a proper petition in which it was stated that the decedent left a widow surviving him, sold a certain lot, being one of two tracts of land of which the decedent was seized in fee simple at his death, for the payment of the debts of the decedent. After the payment of the debts, the widow, with knowledge of all the facts, received the residue of the proceeds of the sale, as a part of the three hundred dollars to which she was entitled, under the statute, as against heirs and creditors.

Held, that the widow was not estopped from claiming her share, as against creditors, of the real estate so sold.

Held, also, that the purchaser at such sale or his vendee could not claim to be a purchaser in good faith believing that he was acquiring an unincumbered title to the entire lot.

Held, also, that the widow's entire interest, as against creditors, in all her husband's real estate could not be assigned to her in one body, upon her selection, from the other unsold tract in which she as widow was tenant in common with the children and heirs at law of her husband.

APPEAL from the Tippecanoe Circuit Court.

ELLIOTT, C. J.—This was a petition for partition filed by

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Hanlon v. Waterbury.

Margaret Waterbury, the appellee, against Hanlon, who is the appellant here. The petition alleged, that said Margaret was seized in fee, by descent from her husband, William Waterbury, of one undivided third part of a lot in the city of Lafayette; and that Hanlon was the owner in fee of the residue, under a sale thereof made by the administrator of her deceased husband, by order of the Tippecanoe Common Pleas Court; and prayed partition. Hanlon filed an answer, to which a demurrer was sustained; he then filed an amended answer and cross complaint, to which a demurrer was also sustained. Hanlon refusing to answer further, the court awarded partition in accordance with the prayer of the petition, which was subsequently made by commissioners appointed by the court, whose report thereof the court confirmed.

The only question in the case arises upon the action of the court in sustaining the demurrer to the answer and cross complaint. The facts alleged in that pleading are, in substance, these:—

That William Waterbury, the husband of said Margaret, in 1863, died, intestate, seized in fee simple of lots 17 and 21, in the addition of Lafayette laid off by the board of commissioners of Tippecanoe county, of the value of nine hundred dollars, and also of another lot or tract of land adjoining said city, of the value of twenty-five hundred dollars; that his personal estate, which came to the hands of his administrator, only amounted to \$109.50, of which said Margaret, as his widow, received \$68.20; that there were debts and liabilities against his estate amounting to nearly four hundred dollars; that, upon a proper petition filed by Hine, the administrator, the court of common pleas of said county ordered the administrator to sell said lots 17 and 21, at public sale, to make assets for the payment of the debts of the decedent. The lots were subsequently sold under said order, and one David Waterbury became the purchaser of lot 17; and lot 21 was bid off by Christian B. Keifer at the sum of \$366. The sales were subsequently

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confirmed by the court. Keifer transferred his certificate of purchase to the appellant, and the purchase-money having been fully paid, the administrator, by order of the court, executed to him a deed for said lot 21; that the conveyance contained no reservation of the rights of said Margaret; that Keifer purchased the same in good faith, believing at the time that he was purchasing the whole of said lot, and the said Hanlon purchased it of Keifer and received a deed therefor under the belief that he was acquiring a title to the entire lot; that on final settlement of the estate there remained in the hands of the administrator \$126.14 of the money realized from the sale of said lots, which the administrator paid over to said Margaret, and it was received by her with a knowledge of all the facts, as a part of the three hundred dollars to which she was entitled by law as the widow of the decedent, as against both the heirs and creditors; that the entire interest of said Margaret in all the real estate of which her husband died seized could be assigned and set over to her out of the remaining unsold lot, or tract. It concludes with a prayer that the children and heirs of the decedent (who are named) be made defendants to the cross complaint, and that, on the final hearing, the court decree that the interest of said Margaret in all of said real estate be assigned to her out of said remaining tract.

It is conceded by the appellant's counsel, that, under section 17 of the statute of descents (1 G. & H. 294), one-third of all the real estate of which William Waterbury died seized descended to the appellee, as his widow, in fee simple, free from all demands of his creditors; but it is insisted, that she might elect, under the provisions of the act of 1859, to have her interest in all of said lands assigned to her in one body out of one of the tracts; and that the receipt by her of the residue of the money arising from the sale of the lots 17 and 21, after the payment of the decedent's debts, with a knowledge of the facts, should be taken as conclusive evidence of such an election, and operate as an estoppel to conclude her from claiming any part of lots 17

and 21. This position claims to much for the act of 1859. That act does not confer on the widow the absolute right to have her interest in several tracts located in a body upon one of them. It provides, that in actions for partition, "where there are several tracts of land in which a widow is entitled either to an estate for life, or in fee simple, and there are tenants in common with her in all, or any part of said lands, such widow may select and accept any particular tract or parcel of such lands, in one body, in lieu of her interest in all or any portion thereof. The commissioners, under the direction of the court, if they deem it just and proper to do so, may assign and set off to such widow, the tract or parcel so selected by her as and for her interest in the whole of said lands, or in such part thereof as may be equal in value to the interest of such tenants in common in such selected tract. All persons legally or equitably interested in all or any tract or parcel of the realty of which the husband died seized, and of which the widow claims partition must be made parties whether each is interested in all the tracts or not, and the partition thereof may be made in the same action." When such a selection is made by the widow, the act simply confers on the commissioners, acting under the direction of the court, the *power* to set over to her the tract so selected in lieu of her separate interest in each, if they deem it just.

To render it just, the tract so selected must not only be fairly equal in value to the interest of the widow in the several tracts, but it must operate justly to the other tenants in common. The act can only apply where the other tenants in common in the several tracts are the same, and where each one's interest bears the same relative proportion in each tract to the interests of the other tenants. It cannot apply where the other tenants in common are different in the several tracts. Suppose an administrator should sell three several tracts of equal value, subject to the rights of the widow, and they should be purchased by different persons; would any one insist that the widow might select one

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of the tracts in lieu of her interest in each, and thereby deprive the purchaser of that tract of his entire estate, and relieve the other tracts from any claim of the widow? The same principle will apply where by such a selection any one of the tenants in common would be deprived of any portion of his interest in the estate. Here the interest that descended to the heirs in lots 17 and 21, was sold by the administrator. That interest was subject by law to the payment of the decedent's debts; it was sold for that purpose, and their rights in the lots were thereby extinguished; and it would be flagrantly unjust to them to incumber the remaining tract, in which they have an interest, with the interest of the widow in the lots sold by the administrator. The widow's interest was not liable for the decedent's debts. The court did not decree its sale, and could not legally do so.

The petition filed by the administrator, praying for an order to sell the lots, stated the fact that the decedent left the appellee, his widow, surviving; and the purchasers at or under that sale must be presumed to have known that she was entitled to one undivided third of the lots, which was not subject to sale for the payment of the husband's debts; and hence they cannot claim to be purchasers in good faith, believing they were thereby acquiring unincumbered titles to the whole of the lots.

The receipt by the widow of the residue of the money, as a part of the three hundred dollars allowed her by the statute, is no evidence of an intention to release her interest in the lot, nor can it operate as an estoppel. She was entitled to three hundred dollars out of the estate, as against both creditors and heirs. The residue thus paid to her on that account was a part of the proceeds of the estate, and the fact that it was derived from the real estate sold by the administrator cannot estop her from asserting her right to her third of the estate, which was not liable to the husband's debts.

Dunham v. Tappan and Others.

We think the demurrer to the answer and cross complaint was correctly sustained; and the judgment must therefore be affirmed.

Judgment affirmed, with costs.

H. W. Chase and *J. A. Wilstach*, for appellant.

G. O. Behm and *A. O. Behm*, for appellee.

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DUNHAM v. TAPPAN and Others.

PRACTICE.—*Erroneous Judgment.*—*Judgment Taken Through Mistake, &c.*—

Application in the form of a complaint, to correct an order directing the distribution of an estate, on the grounds that the order was erroneous and that the plaintiff's attorney misunderstood the action of the court and, being absent when the order was read, took no exception.

Held, that the complaint, though it appeared therefrom that the action of the court was erroneous, was bad on demurrer.

DESCENT.—*Widow.*—A surviving wife who has accepted the provision made for her by the will of her deceased husband is entitled also to the sum of \$300 allowed her by section 21, 1 G. & H. 295.

APPEAL from the Union Common Pleas.

FRAZER, J.—This was an application, in the form of a complaint, to correct an order directing the distribution of an estate. The grounds of the application as stated are: first, that the order was erroneous; second, that the plaintiff's attorney misunderstood the action of the court and, being absent when the order was made, took no exception thereto:

The order was erroneous. *Loring v. Craft*, 16 Ind. 110, is directly in point; and we have no doubt of the correctness of that decision. But such a proceeding as this to correct an erroneous judgment is without precedent or reason to sustain it.

Columbus and Indianapolis Central Railway Co. v. Arnold, Adm'r.

The second ground is wholly insufficient. There is no adequate reason shown upon which a misunderstanding of the action of the court could have reasonably arisen. The appellant has not adopted the right method for obtaining the relief sought.

As the only question before us is upon the action of the court below in sustaining a demurrer to the complaint, the judgment must be affirmed, with costs.

Judgment accordingly.

J. Yaryan, for appellant.

T. W. Bennett, for appellees.

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COLUMBUS AND INDIANAPOLIS CENTRAL RAILWAY COMPANY v.
ARNOLD, Administrator.

NEGLIGENCE.—*Railroad.—Liability for Injury to Employee.*—Suit by an administrator, for the benefit of the children and heirs at law of the deceased, against a railroad company, the complaint alleging, that the decedent had been in the employment of the defendant as fireman on a freight engine for about two months, when, on a day mentioned, he was ordered by defendant to serve as fireman on a particular engine attached to an express passenger train, then running on said road between certain points named; that said engine "was old and rickety, with a weak, defective, patched up, and leaky boiler," which was not strong enough to endure a high pressure of steam, and could not be used with safety in drawing a train of any kind, and that its use to an express train, in its weak and unsound condition, involved great peril to the lives of passengers and employees; that the deceased did not know, and had no means of knowing, the weak and unsafe condition of said engine when he was placed upon it as fireman; that defendant, with full knowledge of the defective and unsafe condition thereof, carelessly and negligently caused the same to be used in drawing said express train; that on the same day the boiler exploded, by reason of its defective and un-

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sound condition, and caused the death of the decedent, without any negligence or fault on his part.

Held, that the complaint was good on demurrer.

SAME.—Master and Servant.—An employer or master is not liable, in the absence of an express contract to that effect, for injuries suffered by one of his employees solely through the carelessness or negligence of another employee of the same master, engaged in the same general business. Nor is the master rendered liable by the fact that the employee receiving the injury is inferior in grade of employment to the one by whose negligence the injury is caused, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end. *Gillenwater v. The M. & I. R. R. Co.*, 5 Ind. 339, and *Fitzpatrick v. The N. A. & S. R. R. Co.*, 7 Ind. 436, disapproved.

RAILROAD.—Board of Directors.—The board of directors of a railroad company are its immediate representatives and occupy the relation of master to the various employees engaged in operating the road and superintending and performing the business of the company in its various departments.

SAME.—Master-Machinist.—A master-machinist who has the immediate charge, control, and direction of the engines and other machinery of a railroad company and the repairs thereof and the control and direction of the engineers and firemen on the trains, is a fellow-servant of such a fireman.

SAME.—Responsibility to Employee.—The principle of *respondet superior* does not apply as between a railroad company and its employees, and the company can only be held responsible to the employee injured without his own fault, while in the discharge of his duty, where the injury is caused by the negligence or failure of the board of directors to perform some duty devolved upon them by express contract with the employee, or which is implied from their relation of master to the employee.

SAME.—Implied Duties.—It is the duty of a railroad corporation to use every reasonable care in the proper construction of its road, in supplying it with the necessary equipment, including properly constructed engines, and the necessary and proper materials for its repair, and in the selection of competent, skilful, and trusty subordinates to supervise, inspect, repair, and regulate the machinery, and to regulate and control the operations of the road. If these duties are performed with care and diligence by the directors, and one of the persons so employed is guilty of negligence, by which an injury occurs to another employee, it is not the negligence of the directors, or master, and the company is not responsible.

SAME.—Notice.—Where the directors have performed these duties and have placed the engines of the company under the immediate charge, control, and direction of a competent and trustworthy master-machinist, and have furnished him with adequate materials and resources for their repair, notice to the directors that an engine is out of repair and unsafe for use is not, in the absence of notice that it is being so used, sufficient to render the company liable for an injury to a fireman employed by the company, while in the performance of his duty upon such engine under the direction of

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the master-machinist, caused by the explosion of the boiler, by reason of its defective condition, without his fault or negligence or the fault or negligence of the engineer in charge.

APPEAL from the Marion Common Pleas.

This was an action by James H. Arnold, as administrator of James H. Scott, deceased, against the Columbus and Indianapolis Central Railway Company, the appellant, for causing the death of the decedent, an employee of the company.

The suit was brought for the benefit of two infant sons of the deceased, who are his only children and heirs at law.

The complaint is in two paragraphs. The first paragraph alleges, that the decedent had been in the employ of the appellant, as fireman on a freight engine, for about two months, when, on the morning of the 5th of February, 1867, he was ordered by the appellant to serve as fireman on engine No. 16, attached to an express passenger train, then running on said road between Indianapolis and Columbus, Ohio; that said engine "was old and rickety, with a weak, defective, patched up, and leaky boiler," which was not strong enough to endure a high pressure of steam, and could not be used with safety in drawing a train of any kind, and that its use to an express train, in its weak and unsound condition, involved great peril to the lives of both passengers and employees; that the deceased did not know, and had no means of knowing, the weak and unsafe condition of said engine when he was placed upon it as fireman; that the appellant, with full knowledge of the defective and unsafe condition thereof, carelessly and negligently caused the same to be used in drawing said express train, and on the same day the boiler exploded, by reason of its defective and unsound condition, and caused the death of the decedent, without any negligence or fault on his part.

The second paragraph contains, substantially, the same averments as the first, except it alleges, that the explosion of the boiler and death of Scott occurred in the State of Ohio, and sets out the statute of that State, authorizing

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suits by administrators in such cases, which is substantially the same as the statute of Indiana on the same subject.

A demurrer to each paragraph of the complaint was overruled, and the ruling excepted to. An answer, consisting of a general denial and several special paragraphs, was then filed, upon which issues were formed and a trial was had, resulting in a verdict for the plaintiff for twenty-five hundred dollars.

A motion for a new trial being overruled, judgment was rendered on the verdict. Other facts in the case, as well as the questions involved, are stated in the opinion of the court.

ELLIOTT, C. J.—The first question in the case is presented by the demurrer to the complaint, which was overruled by the court. We think there was no error in that ruling. The complaint alleges, that the engine was old, and the boiler was so worn and defective that it was unsafe, and its use involved great peril to the lives of the employees, of which the appellant had full notice, though the deceased was ignorant thereof, and that the appellant, knowing the unsafe condition of the engine, negligently and carelessly caused it to be used in drawing the express train; that by reason of its defective and unsound condition, and without any fault of the deceased, the boiler exploded and caused his death.

skillful A railroad company, occupying the relation of master in such cases, is bound to its servants and employees on its trains to use reasonable care in furnishing the road with proper and safe machinery, and in the employment of competent and *skillful* agents to superintend and keep it in proper repair.

The master is not responsible to an employee for an injury occasioned by the carelessness or negligence of a co-employee or fellow servant. But here it is alleged that the appellant, the master, was notified of the unsafe condition.

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of the engine, and negligently caused it to be used, whereby the fatal injury occurred. The negligent acts complained of are imputed to the master, and not to an employee; and if the allegations are true, the appellant is clearly responsible.

The question of the relation of co-employees to each other and the duty and liability of the master to them will be more fully discussed in a subsequent part of this opinion.

The evidence given on the trial is before us, and discloses the following facts, in reference to which there is no controversy: Thomas V. Losee was in the employ of the company, as master-machinist for the western division of the road, and had occupied that position at Indianapolis from 1863 until the time of the trial; and as such he had the immediate control, direction, and supervision of the engines and other machinery, and of the engineers and firemen on the engines on that division of the road. He selected the engine, engineer, and fireman for each particular service or train, and ordered them accordingly. He was a skilful and experienced master-machinist, and entirely competent to the proper performance of the duties required of him.

On the morning of the 5th of February, 1867, at Indianapolis, by Losee's direction, one Lederer was put in charge of engine No. 16, with Scott as fireman, in running an express passenger train between that place and Columbus, Ohio; and on the same day, whilst so engaged, the boiler of the engine exploded, when in the State of Ohio, and caused the death of Scott. The explosion occurred in the fire-box. The engine was thrown some distance from the track and its direction reversed. It was a Hinkley engine, built at the Boston Locomotive Works, and purchased by the company in 1852. It was a good engine, and had done valuable service.

A new fire-box was placed in it in 1862, which was repaired and put in good order about four or five months before the explosion. The engine, for some time previous, had been used mostly for freight purposes, though for three

or four weeks immediately preceding the explosion it was used with a passenger train, and did good service.

Neither the engineer nor Scott had been in the employ of the appellant over about two months, and neither had served on engine No. 16 until the day of the explosion.

The instructions given by the court to the jury were excepted to by the appellant, and exceptions were also taken to the refusal of the court to give numerous instructions asked by the appellant.

A recovery was sought on the grounds that the engine was old, worn out, and unfit for service, and that its condition was known to Losee, or might have been known to him by a proper examination, which he failed to make, and carelessly and in neglect of his duty ordered it to be used in its unsafe condition, and thereby caused the death of Scott; that Losee, as master-machinist, was the representative of the appellant, and not, in a legal sense, a fellow-servant or co-employee with Scott; and that the appellant was, therefore, responsible in damages for the death of Scott, caused by Losee's negligence.

This theory is clearly sustained by the instructions of the court to the jury, and in the refusal to give any of the various instructions asked by the appellant maintaining a contrary doctrine. Thus, the court instructed the jury as follows:—

“3. It was the duty of the defendant to see to it that the road was equipped with sufficient, suitable, and safe engines and machinery, and materials of the necessary quality, and men of the knowledge, skill, care, and capacity, necessary for the well and faithful discharge of all the duties that appertain to the positions they severally occupied. For the faithful discharge of this obligation the defendant is holden to each and every person whom it employs in the business of running the road. And if you find from the evidence that the defendant had knowledge, or in the exercise of due care might have known, that the engine in question was defective, insufficient, and unsafe for the service in which the same was employed, and the explosion which re-

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sulted in the death of Scott was caused by the defective and unsafe condition of the engine, *without the fault or negligence of the deceased or of the engineer contributing to the result*, in that case the plaintiff will be entitled to recover."

"4. The amount or degree of care which the defendant is bound to use, in order to see that her machinery and engines are in proper order and condition for the service required of them, should be proportioned to the risk and danger to life which would probably result from negligence and carelessness in this regard."

"7. If the engine had been recently overhauled by a competent and skilful machinist, *and he used due care and diligence* in putting her in repair, and put her upon the trip at the time of the accident, *in a safe and good condition, capable of making the trip*, if used in a proper manner, but she was carelessly, negligently, or unskilfully used by the deceased or the engineer in charge, and the accident resulted from careless usage, in that case the plaintiff cannot recover."

One of the instructions asked by the appellant, which the court refused to give, is as follows:—

"15. The business of a railroad is, of necessity, conducted by a number and variety of agents and employees, and the condition and control of its machinery are also, of necessity, under the supervision of agents and employees; and when one accepts a situation on any given road, where he must necessarily be exposed to injury by any want of care or by the recklessness of a fellow-servant, he must be held to have entered such employment in view of such hazard, and he cannot recover for an injury resulting from the carelessness or recklessness of a fellow-servant, if the company has been prudent and careful in the selection of such fellow-servant, and especially if the fellow-servant through whose act or negligence the injury results is and had been a prudent, careful employee, and competent to the work placed under his care, although the particular act

complained of may have been his gross negligence or recklessness."

The appellant also asked the court to instruct the jury as follows:—

"11. The defendant is not liable for injuries resulting from latent defects in machinery such as cannot be detected by the care and skill of those competent to test the sufficiency of the machinery on the road." The court refused, however, to give it as asked, but gave it after adding to it these qualifying words: "*if care and diligence is used in examining and inspecting the machinery.*"

This instruction was also moved by the appellant, viz.:—

"21. So far as concerns the employees of railroad companies, there is no implied warranty of life or guaranty against injury; but the employee takes his place subject to all the dangers incident to the position. The company is only bound to furnish competent and careful employees, to keep her machinery in repair and safe condition, so far as she can by competent and careful workmen; and if you believe from the evidence that she did it in this case, the plaintiff cannot recover, though the deceased came to his death by the explosion complained of." This the court refused, but in lieu thereof instructed thus: "So far as concerns the employees of railroad companies, there is no implied warranty of life or guaranty against injury, but the employee takes his place subject to all the dangers incident to the position. The company is only bound to furnish competent and careful employees, to keep her machinery in repair and safe condition, so far as she can by competent and careful workman, *using due care to see that her machinery is in good and safe repair*; and if you believe from the evidence *that she did use such care in this case*, the plaintiff cannot recover, though the deceased came to his death by the explosion complained of."

The instruction, as asked, claims that the appellant was not responsible, if the employees having the care and management of the machinery and of its repairs and condition

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were competent, and careful in the discharge of their duties, although the decedent came to his death by the carelessness of such co-employees. But by the modification made by the court, which we have italicized, an entirely different principle is asserted. The instruction, as given, in effect, said to the jury that the appellant was bound to see to it that the machinery of the road was kept in proper order, and if the engine was in an unsafe condition, and was thus used by order of the master-machinist, and if the explosion resulted from the unsafe condition of the engine, the appellant was responsible, notwithstanding the master-machinist was competent, and careful, and worthy to be trusted in his position.

It is a well settled principle of the law, that the employer or master is not liable for injuries suffered by one employee solely through the carelessness or negligence of another employee of the same master, engaged in the same general business.

Each employee engaged with others in the service of a common master takes upon himself the liability to injury resulting from the negligence of his co-employees. The hazard is incident to the nature of the employment into which he enters, and in respect to which the master is not an insurer, in the absence of an express contract to that effect. Nor is the master liable by the fact that the employee receiving the injury is inferior in grade of employment to the party by whose negligence the injury is caused, if both are employed in the same general business, or in other words, "if the services of each in his particular sphere or department are directed to the accomplishment of the same general end." *Warner v. The Erie Railway Co.*, recently decided by the Court of Appeals of N. Y. and reported in 8 Am. Law Reg. (n. s.) 209; *Priestley v. Fowler*, 3 M. & W. 1; *Coon v. Utica, &c., R. R. Co.* 5 N. Y. 492; *Albro v. Agawam Canal Co.*, 6 Cush. 75.

In *Gillenwater v. The M. & I. R. R. Co.*, 5 Ind. 339, and *Fitzpatrick v. The N. A. & S. R. R. Co.*, 7 Ind. 436; it was

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held, that a railroad company is liable to a servant for an injury occasioned by the negligence of other servants of the company, where the duties of the latter, in connection with which the injury happens, are not common or in the same department with those of the injured servant, and where the negligence of the latter has not contributed to produce the injury. But this limitation of the exemption of the company from liability in such cases is not recognized in any of the subsequent cases; and it is now settled in this State, that the employer is not liable for an injury to one employee, occasioned by the negligence of another engaged in the same general undertaking. *The O. & M. R. R. Co. v. Tindall*, 13 Ind. 366; *Wilson v. The Madison &c. R. R. Co.*, 18 Ind. 226; *Slattery's Adm'r v. The Toledo & W. R. W. Co.*, 23 Ind. 81; *The O. & M. R. R. Co. v. Hammersley*, 28 Ind. 371. In *Slattery's Adm'r. v. The Toledo & W. R. R. Co.*, *supra*, WORDEN, J., quotes, with approbation, from the decision in *Wright v. The N. Y. Central R. R. Co.*, 25 N. Y. 562, as follows: "Neither is it necessary, in order to bring a case within the general rule of exemption, that the servants, the one that suffers and the one that causes the injury, should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes, as in maintaining and operating a railroad, operating a factory, working a mine, or erecting a building. The question is whether they are under the same general control."

To the same effect is the case of *Manville v. The Cleveland &c. R. R. Co.*, 11 Ohio St. 417, where it is said, that "those employed in facilitating the running of the trains, by ballasting the track, removing obstructions, and those employed at stations, attending to switches, and other duties of a like nature upon the road, as well as those upon the trains, operating, may all be well regarded as fellow-servants in the common service."

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In the case at bar, Losee, as master-machinist, had the immediate charge, control, and direction of the machinery, and of its repairs, as well as the control and direction of the engineers and firemen on the trains.

He and the deceased were both employees of the appellant, engaged in the same general undertaking, operating the road—indeed, in the same department, the one serving under the immediate direction and control of the other. They were fellow-servants, and the appellant is not responsible for an injury to the one, caused by the negligence of the other.

But it is insisted, that the appellant was bound to the employees to furnish the road with sound and safe machinery, and to keep it in safe repair and condition, and if the explosion of the boiler and the death of the deceased were caused by the use of the engine when in an unsafe condition, the fault is attributable to the appellant, and the plaintiff is entitled to recover. We do not think this position is sound in principle, or sustained by the weight of authority, though cases may be found to support it.

The board of directors of a railroad company are its immediate representatives, and occupy the relation of master to the various employees engaged in operating the road and superintending and performing the business of the company in its various departments. When an injury results to a passenger on a train, or to a stranger, from the negligence or carelessness of an employee in the discharge of the duties devolving upon him, the principle of *respond-eat superior* applies, and the company is responsible in damages; but this principle does not apply as between the company and its employees, and in such cases the company can only be held responsible to the employee where the injury is caused by the negligence or failure of the board of directors to perform some duty devolved upon them by express contract with the employee, or which is implied from the duties devolving upon them in their relation of master to the employee. The directors of such a corporation, from

the very nature of the organization and the business in which it is engaged, are not expected personally to superintend the various operations of the road. There is no implied obligation that they should do so; nor is it to be presumed that they are selected with a view to their qualifications and skill for the performance of many of the duties required in constructing, equipping, and operating the road. The master is not liable to his servant, unless there be negligence on the part of the master, in that which the master has contracted or undertaken, either expressly or impliedly, to do.

It is the duty of such a corporation to use every reasonable care in the proper construction of its road, and in supplying it with the necessary equipment, including properly constructed engines, and the necessary and proper materials for its repair, and the selection of competent, skilful, and trusty subordinates to supervise, inspect, repair, and regulate the machinery, and to regulate and control the operations of the road. If these duties are performed with care and diligence by the directors, and one of the persons so employed is guilty of negligence by which an injury occurs to another, it is not the negligence of the directors, or master, and the company is not responsible. This position is sustained by the rulings of this court in *The Chicago & N. W. R. R. Co. v. Harney*, 28 Ind. 28, and *The O. & M. R. R. Co. v. Hammersley*, *id.* 371.

In the case of *Warner v. The Erie Railway Co.*, *supra*, the action was brought to recover damages arising from a personal injury which resulted in the death of one of the defendant's employees, a baggageman, on a train which was precipitated into a stream by the falling of a bridge. The jury found that the bridge fell from decay in its timbers. The bridge was properly constructed and was originally of sufficient strength for the purposes for which it was intended. It was held, that the company was not liable, in the absence of proof that the directors of the company had notice of the unsafe condition of the bridge.

The case of *Wilson v. Merry*, decided in the English

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House of Lords, in May, 1865, and reported in the Law Reports, Appellate Series, part 3d, for July, 1868, p. 326, is said to be a very instructive case on this subject. The report containing the case is not in our reach, but we find a somewhat comprehensive notice of it in *Warner v. Erie Railway Co.*, *supra*, the substance of which is as follows:—

It was a Scotch appeal in a case where a verdict had been recovered against the proprietors of a coal-mine, for the death of a party occasioned, as was alleged, by the defective construction of a scaffold in the mine. "The case turned upon the liability of the master for an injury to his employee, where the master did not personally superintend the work, but devolved it upon a suitable mechanic or foreman, superior in grade to the injured employee. Opinions were given by the Lord Chancellor, Lord CAIRNS, and by the ex-Chancellors, Lord CRANWORTH and Lord CHELMSFORD, all substantially concurring in the conclusion, that the duty of the master was to select proper and competent persons to do the work, and furnish them with adequate materials and resources for its accomplishment; and when he had done that, he had performed his whole duty. In the course of his opinion, Lord CAIRNS says: 'The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master, in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business; but to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work.' He adds, 'if the persons so selected are guilty of negligence, this is not any negligence of the master; and if an accident occurs to a workman to-day, in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is not liable, although the two cannot technically be described as fellow-workmen; negligence cannot exist, if the master does his best to supply competent persons. He can-

not warrant the competency of his servants." See, also, *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562.

One of the cases cited by the appellee, and much relied on to sustain the rulings of the court below, is that of *Warner v. The Erie Railway Co.*, in the Supreme Court of New York, 49 Barb. 558; but that case, as we have seen, was subsequently reversed by the Court of Appeals, on the very point to which it is cited as authority. 39 N. Y. 468.

Here the evidence conclusively shows that Losee was skilful and competent, and that the shop of the appellant at Indianapolis was furnished with all the necessary appliances, and with adequate materials and resources, and skilful workmen to keep the machinery in repair.

Notice to the directors of the company that the engine was out of repair and unsafe for use would not of itself be sufficient to render the company liable. Such machinery is often liable to get out of repair and become unsafe. The directors did not, in person, superintend its repairs or direct its use, but devolved these duties on a skilful, competent, and trustworthy master-machinist, and furnished him with adequate materials and resources for its repair. They did not direct or authorize its use when in an unsafe condition, and are not responsible for its use in that condition, in the absence of notice that it was being so used. But there was no evidence even tending to prove that the directors of the company had any notice that the engine was in an unsafe condition, or that it was being so used.

We have discussed the questions involved in the case on the hypothesis that the engine was defective and unsafe, and was carelessly put into the service in that condition by Losee, and that the explosion was caused by the defective condition of the engine, and without any fault or negligence on the part of the deceased, or of the engineer in charge; but we are by no means satisfied that the evidence justifies such a conclusion. It was a rule of the service, that when an engine was out of repair, rendering it unsafe or unfit for the service required, the engineer in charge should report the

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fact promptly to the master-machinist. No such report was made as to engine No. 16, nor was there any evidence that the master-machinist had any notice, in fact, that it was in an unsafe condition or needed repairs; whilst the engineer who had been in charge of and daily used it for months, and up to the day on which the deceased was placed on it as fireman, testified that it was a good machine, in a safe condition and in good repair the day before the accident. The only evidence to the contrary was that of the engineer in charge of it on the day of the explosion, who testified, that the boiler was leaking at the flues, in the flue-sheet; but the explosion is not ascribed to that cause. He further testified, that the explosion occurred in the fire-box, and without any fault on his part or that of the deceased. When asked if he knew whether the fire-box and crown-sheet were old or new, he answered, that he did not know, and could not tell from outside appearances; that it was impossible to tell, when it was coated over with lime on the inside; that "it might very often look very well on the outside, while it was all rotten on the inside." He was also asked, what was the cause of the explosion to the best of his knowledge and judgment; to which he answered, "The deficiency of the fire-box, as far as I know. It was old and worn out." His leg was broken by the explosion, and he did not examine the fire-box afterwards. He had never run the engine until that day, and had no previous knowledge of it; and when it is remembered that he had just previously testified, that he did not know whether the fire-box was old or new, and could not tell from outside appearances, the only view he ever had of it, his opinion as to the cause of the explosion is entitled to but little weight. On the other hand, the nature of the explosion and the evidence of witnesses of skill and experience very strongly indicate that the water was suffered to get too low in the boiler, in consequence of which—the steam being shut off for a time, when on a down grade—the water sank below the crown-sheet of the fire-box, which became highly heated, and

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when the steam was let on the water rose upon the crown-sheet, in its heated condition, and thereby caused the explosion. But we need not discuss the evidence on this point. The court erred in the instructions to the jury as already indicated, and in refusing to give instructions 11, 15, and 21, as asked by the appellant, and a new trial should, therefore, have been granted.

Judgment reversed, with costs; and the cause remanded, for a new trial and further proceedings not inconsistent with this opinion.

J. L. Ketcham and *J. L. Mitchell*, for appellant.

J. T. Dye and *A. C. Harris*, for appellee.

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CRIMINAL LAW.—Sunday.—Work of Necessity.—On the trial of an information for a violation of the Sabbath, under the act of 1855 (2 G. & H. 481), the evidence showed that the defendant was engaged on a certain Sunday in gathering and boiling sugar-water on his premises; that it was a good day for the flowing of the water; that his troughs were full and running over; that he had no way to save the water but by gathering and boiling it.

Held, that this was a work of necessity within the statute.

SAME.—Practice.—Motion in Arrest.—A variance between the affidavit and the information cannot be taken advantage of by motion in arrest.

APPEAL from the Rush Common Pleas.

GREGORY, J.—Information against the appellant for a violation of the Sabbath, under the act of February 28th, 1855, 2 G. & H. 481, sec. 1.

The affidavit charged the offense on the 31st of March, 1867; the information charged it on the 31st of March, 1868. Plea, not guilty; trial by the court; finding, guilty; motion for a new trial overruled; motion in arrest overruled; and judgment.

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The evidence, being in the record, shows that on Sunday the 31st day of March, 1867, the defendant was engaged in gathering and boiling sugar-water on his premises; that it was a good day for the flowing of the water; that his troughs were full and running over; that he had no way to save the water but by gathering and boiling it. Was it a work of necessity?

As to what was meant by a work of "necessity" under a very similar statute came in review in *Flagg v. The Inhabitants of Millbury*, 4 Cush. 243. WILDE, J., speaking for the court, says, "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may be deemed necessity within the statute; and so it was decided, in the construction of a similar exception, in the prohibition against traveling on the Lord's day, in the statute of 1791, c. 58, § 2. *Commonwealth v. Knox*, 6 Mass. 76; *Pearce v. Atwood*, 13 Mass. 354." In the *Commonwealth v. Knox*, *supra*, PARSONS, C. J., says, "By necessity, there, cannot be understood physical necessity; for a case in which any man is physically obliged to travel can hardly be imagined. But a moral fitness or propriety of traveling, under the circumstances of any particular case, may be deemed necessity within this section; and *a fortiori*, when the traveling is necessary to execute a lawful contract, it cannot be considered as unnecessary travelling, against the prohibition of the statute."

In *McGatrick v. Wason*, 4 Ohio St. 566, THURMAN, C. J., in delivering the opinion of the court, says, "Nor will it do to limit the word 'necessity' to those cases of danger to life, health, or property, which are beyond human foresight or control. On the contrary, the necessity may grow out of, or indeed be incident to a particular trade or calling, and yet be a case of necessity within the meaning of the act. For it is no part of the design of the act to destroy, or impose onerous restrictions upon, any lawful trade or business;

and hence, under a similar statute, it has been held in a sister state, that it is lawful to keep a blast furnace at work on Sunday, because it is a work of necessity. So too it has been held, that under special circumstances, a mill may grind on that day; and I think it will hardly be questioned, that a gas company may supply gas; a water company, water; and a dairyman, milk; to their respective customers, on that day."

This question has received the attention of the courts in Pennsylvania, New York, Alabama, Missouri, and New Hampshire, with like results. *Logan v. Mathews*, 6 Penn. St. 417; *Hooper v. Edwards*, 18 Ala. 280; 25 Ala. 528; *The State v. Stone*, 15 Mo. 513; *Clough v. Shepherd*, 11 Fost. (N.H.) 490; *Parmalee v. Wilks*, 22 Barb. 539.

Sugar making from the maple is but for short periods, depending on the season and the weather. It is too short and precarious to justify a very large outlay in preparing vessels. The water is usually boiled down as it is gathered from the troughs in which it is caught.

We think the labor performed by the appellant in gathering and boiling the sugar-water, under the circumstances, was a necessity under the statute.

A variance between the affidavit and information cannot be taken advantage of by motion in arrest.

Judgment reversed, and cause remanded, with directions to grant a new trial, and for further proceedings.

L. & W. O. Sexton, for appellant.

H. M. Spalding and *D. E. Williamson*, Attorney General, for the State.

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INDICTMENT.—*Obtaining Money Under False Pretenses.*—Indictment charging, that "A. and B., on &c., at &c., did, feloniously, designedly, and with intent to defraud C., represent and pretend to said C. that a certain bank check and order for the payment of money (here set out *in hæc verba*, purporting to be drawn by D., payable to E., and indorsed by the latter in blank) which the said A. then had in his possession, was good and of the value stated on its face, to wit, eight hundred dollars in currency; by means of which false pretense said A. and B. did then and there obtain from said C. (certain money specified) the goods, &c., of said C.; and the said A. and B. then and there delivered said check to said C., to be kept by him as security for the payment of said money by him loaned to said A. and B., which was then and there obtained from said C. as aforesaid by them, with intent to cheat and defraud him; whereas in truth, &c., said check was not good, was not of the value of eight hundred dollars in currency, but was of no value whatever; all of which said A. and B. then and there well knew," &c.

Held, that the indictment showed, not merely a false promise, but a false pretense as to an existing fact, and was sufficient.

APPEAL from the Marion Criminal Circuit Court.

FRAZER, J.—Several questions are pressed upon our attention by the argument in this case. But a single one of them, however, is presented in the manner required by the tenth rule of this court, and that only will, therefore, receive consideration. It is as to the legal sufficiency of the third count of the indictment, a motion to quash which was overruled by the court below.

The count charged, that "John Maley and Jeremiah O'Leary, on, &c., at, &c., did, feloniously, designedly, and with intent to defraud Charles Coleman, represent and pretend to the said Coleman, that a certain bank check and order for the payment of money (here set out *in hæc verba*, purporting to be drawn by I. A. Sirger, payable to A. E. Roper, and indorsed by the latter in blank), which the said Maley then had in his possession, was good and of the value stated on its face, to wit, eight hundred dollars in currency; by means of which false pretense said M. and O'L. did then and there obtain from said Coleman (certain money speci-

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fied) the goods, &c., of said Coleman; and the said M. and O'L. then and there delivered said check to said Coleman to be kept by him as security for the payment of said money by him loaned to said M. and O'L., which was then and there obtained from said Coleman as aforesaid by them, with intent to cheat and defraud him. Whereas, in truth, &c., said check was not good, was not of the value of eight hundred dollars in currency, but was of no value whatever; all of which said M. and O'L. then and there well knew," &c.

The objection made to the sufficiency of the count is, that it charges only a false promise by the defendants, and not a false pretense as to an existing fact. We do not so understand it; and when it is noticed that the check purported to be drawn and indorsed, not by the defendants, but by third persons, no room is left upon which to base an argument in support of the proposition that the transaction was merely a promise by the defendants to provide funds to meet the check.

Judgment affirmed, with costs.

W. W. Leathers, for appellant.

D. E. Williamson, Attorney General, for the State.

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CRIMINAL LAW.—Change of Venue.—Affidavits.—In a criminal action the defendant moved for a change of venue on account of local excitement and prejudice, and filed affidavits in support of the motion. Counter affidavits were filed by the State; and thereupon the defendant moved for leave to file additional affidavits in support of the application, which the court refused.

Held, that as no additional affidavits were offered by the defendant, no question could be raised in the Supreme Court upon this ruling.

SAME.—Judicial Discretion.—Query, whether the Supreme Court ought, under

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any circumstances, to reverse the ruling of a court refusing to grant a change of venue where the affidavit is founded upon excitement or prejudice in the county against the defendant.

SAME.—Juror.—Competency.—Previously Formed Opinion.—Rumor.—Newspaper Statements.—On the examination of persons called as jurors to try an indictment for murder, as to their competency, certain ones of the panel answered, that they had formed opinions as to the guilt or innocence of the defendant, from rumor and newspaper statements on that subject. Upon further examination each of said persons answered, that it would require neither more nor less evidence to satisfy him of the existence or non-existence of the material facts involved in the case by reason of his so already formed opinion. The court thereupon overruled the defendant's challenge "for cause."

Held, that this ruling was correct.

DYING DECLARATIONS.—When Admitted.—Where the statements of a person are offered in evidence as his dying declarations, the proof must clearly show that the declarant was in fact at the very point of death, and that he was fully conscious of that fact, not as a thing of surmise and conjecture, or apprehension, but as a fixed and inevitable fact.

SAME.—It is not required that the deceased should have declared in terms that he expected to die at once, if his condition was such that, of necessity, such an impression must have existed on his mind. On the other hand, no matter how strong the expression of this certainty of death may have been, if there be any evidence of hope in the language or actions of the declarant, his statements will be rejected.

APPEAL from the Vigo Criminal Circuit Court.

RAY, J.—The appellant was indicted in the Vigo Criminal Circuit Court, on the 15th day of July, 1869, for the murder of John Petri on the 11th day of the same month. He was arraigned and pleaded not guilty, upon the day the indictment was found, and entered upon his trial on the 19th day of the month.

A motion was made for a change of venue, supported by the affidavits of the appellant and two other persons.

The affidavits alleged, that a bitter feeling and intense excitement existed over the entire county, created by the circumstances attending the death of Petri, which would prevent the appellant from receiving a fair and impartial trial within the jurisdiction of that court; that certain publications had been made in all the newspapers of that locality, calculated to cause, and which had resulted in producing, a

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conviction in the public mind of the guilt of the accused, and rendering it impossible to secure disinterested and unbiassed triers. Counter affidavits were also presented by the State, embracing one made by the sheriff of the county and also the sworn statements of five other citizens, that the excitement and ill feeling manifested toward the prisoner was confined to the city of Terre Haute, and that a jury free from all improper influences could be secured from other portions of the county. The appellant thereupon moved the court for leave to file other and additional affidavits in support of his application for a change of venue. This the court refused. Inasmuch as no additional affidavits were offered, no question arises upon this ruling. The judgment of the court is not to be invoked in mere wantonness. Upon the presentation of an affidavit for the purpose of filing it in the case, a ruling of the court may be required, which may be the subject of review here. Upon an examination of an affidavit thus presented, with all the circumstances attending the motion, brought before us by a bill of exceptions, we have a basis upon which to question or approve the judgment of the court below.

The motion for a change of venue was overruled. We are asked to review this action of the court. In the case of *Anderson v. The State*, 28 Ind. 22, the same point was presented, and after a careful consideration of the subject, we affirmed the ruling of the circuit court. The present application for a change of venue is not more strongly supported. The affidavits here presented disclose a feeling of strong excitement in the city near which the crime was committed. This was not extraordinary. A terrible offense had been perpetrated. The residence of a reputable citizen had been feloniously entered on Sunday noon, during the absence of the family, and upon the sudden return of the proprietor, he is killed in his own bed-room by the felon. The arrest follows, the same evening. Horror at the crime, indignation against the perpetrator, and a desire for swift and sure punishment convulse the community. The grand jury are at once sum-

moned, an indictment is found, and on the fourth day from the tragedy the accused pleads for his life, in the midst of a community thus wrought upon—pleads when his counsel even act under the appointment of the court. Under such circumstances, the position of the judge before whom the suspected criminal stands involves grave responsibilities. Under such circumstances, it sometimes happens that public clamor demands of the court, not a just administration of the law, but its aid in securing through legal forms some victim to popular indignation. It were better that the mob should execute its will—terrible as the alternative may be—than that a judge should yield one right secured to the prisoner by the law. The court, when the excitement is passed, will retain the public confidence in its due and proper administration of the law—a loss of which would be irreparable. The excess of popular violence, although it cannot correct the injustice it may have worked, will bring an assured repentance.

We do not intend by these remarks to imply that we are satisfied that there has been in this case an abuse of the discretion confided to the court, but we make them because it is apparent that the surroundings were not such as most certainly to secure, what the appellant was clearly entitled to, a fair trial before men who had not prejudged his case. We are not content by our silence seemingly to approve the haste which places the accused, within the week his alleged victim expires, in the midst of a community excited by the outrage, on trial for his life. A jury, however, were empanelled from other portions of the county, where it was alleged no unusual excitement existed, and as the statute places the matter of a change of the locality of the trial within the discretion of the judge before whom the application is made, we do not feel that the present case authorizes us to reverse the ruling, if, indeed, we ought to do so under any circumstances.

On the examination of persons called as jurors, as to their competency, five of the panel answered, that they had formed

an opinion as to the guilt or innocence of the appellant, from rumor and newspaper statements on that subject. Upon further examination, each of said persons answered, that it would require neither more nor less evidence to satisfy him of the existence or non-existence of the material facts involved in the case, by reason of such already formed opinion. The court thereupon overruled the challenge by appellant "for cause."

This ruling was in full accord with the decision of this court in the case of *Fahnestock v. The State*, 23 Ind. 231. It is in vain, in the presence of a telegraph that throbs with every beat of the world's life, and a daily press to register each pulsation, for courts longer to expect ignorance of a fact notorious combined with general intelligence. Ignorance of a matter made notorious by publication will seldom be found where sufficient discrimination exists to detect falsehood from truth. The rapidity with which information is conveyed, and the haste to place it before the public, involve so much inaccuracy in its statement that experience soon instructs the reader, and the impression formed fades at once before the living witness. An impression so left is practically harmless, and a theory which rejects such jurors cannot be sustained in practice.

On the trial, the statement made by Petri, on Sunday afternoon, about an hour after the shooting had occurred, in regard to the circumstances attending the injury, were offered as his dying declarations; and upon certain evidence as to his condition at the time the statements were made being adduced, the court, over the objection of the appellant, permitted them to go to the jury. It is assigned as error, that the evidence as to the condition of Petri did not show him to have been *in extremis* at the time his declarations were made.

It is a relief when called upon to test a given state of facts by a rule of law, to find that rule well defined, marked, and clear, founded upon a plain reason, and sustained by uniform authority.

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Such is the rule under which certain statements made by one speaking, not under the obligation of an oath, but in the very presence of death, are received in evidence. No well considered case has attempted to extend or limit the established rule; and where error has been committed, it has occurred in its application to facts. The principle, as stated by Lord Chief Baron EYRE, on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice. *Woodcock's Case*, 2 Leach (3d ed.), 563.

In the last edition of Greenleaf on Evidence, vol. 1, p. 182, Judge REDFIELD has added this note to the text: This evidence "is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of the admission, for if that were all that is requisite to render the declarations evidence, the apprehension of death should have the same effect, since it would place the declarant under the same restraint as if the apprehension were founded in fact. But both must concur, both the fact and the apprehension of being *in extremis*. This presumption and the consequent probability of the crime going unpunished, is unquestionably the chief ground of this exception in the law of evidence;" and accordingly they are received, "only where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the declarations." *The King v. Mead*, 2. B. & C. 605; 1 Phillipps Ev. (4th Am. ed.) 287; 1 Greenl. Ev. 181.

As this class of evidence forms an exception to the gen-

eral rule; as there can be no cross examination of the declarant; as the accused cannot often meet his accuser face to face; and as there must of necessity exist great danger of abuse; it must clearly appear that the statements offered in evidence have been made under a full realization that the solemn hour of death has come. In the case of *Smith v. The State*, 9 Humph. 9, it is said, "Testimony of this character is only admitted from necessity, and an abuse of it is guarded against by the law with most minute particularity. There is no one principle better established than that such declarations shall not be received unless the proof clearly shows that the deceased was *in extremis* (perhaps the words *in articulo mortis*, which are used by some of the authorities to express this condition, are more accurate) and that he or she, at the time of making them, was fully conscious of that fact, not as a thing of surmise and conjecture or apprehension, but as a fixed and inevitable fact." One eminent writer calls it the apprehension of "impending death." 2 Ev. Poth. 293. In the note to Phillipps on Ev. vol. 1, p. 291, it is said, "In the meantime he is not only certain of ultimate death, but he is strongly persuaded that death is rapidly approaching. It is so near that all motives to falsehood are superseded by the strongest inducements to strict veracity." "The judge should be satisfied that the declaration was made under an impression of almost immediate dissolution." *Ib.* See, also, *Rex v. Callaghan*, MacNally Ev. 385.

It is not required that the deceased should have declared in terms that he expected to die at once, if his condition be such that, of necessity, such an impression must exist on his mind. In *Woodcock's Case*, *supra*, it was deemed sufficient, to show that the deceased had been mortally wounded and was in a condition which rendered almost immediate death inevitable; and that she was thought by every person about her to be dying. No matter how strong the expression of this certainty of death may be, if there be any evidence of

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hope, in the language or actions of the declarant, his statements will be rejected.

The bill of exceptions states the following as the evidence upon which the declarations of Petri were admitted:—

Charles May stated, "I asked John what was the matter. John pulled up his shirt and said, 'I am in a bad fix;' and John said he could not recover. This was about one or two o'clock on Sunday, about an hour after the shooting. That after this conversation took place, he, May, went for a doctor for Petri."

Moritz Hosmour stated, that he "saw Petri about an hour after he was shot and before the doctor got there, and he, Petri, told me he felt bad and thought he would not get well." The wounds were two in number, each from a small pistol ball; one in the left jaw, not dangerous; and the other lodged in the cavity of the abdomen. It has, from experience during the late war, become a matter of popular knowledge, that wounds in such parts of the body are not, of necessity, fatal, and where death does not at once result, it can only be foretold by the careful examination of a person of skill in such matters.

It is very clear that this evidence did not authorize the court to admit the statements of Petri. There is no proof that the deceased regarded himself as at the point of death. The wounds did not authorize such a conclusion. The fact that he did die at the close of the next day is certainly not sufficient. After the wounds were received, the deceased followed Morgan with his gun for a quarter of a mile and until he lost sight of him. Certainly he did not regard himself as a dying man when in that pursuit; and within an hour after the wounds, is it not an unfair presumption to assume that he felt in the hands of death?—death immediate and inevitable? In the language already quoted, the proof must clearly show that the declarant was in fact at the very point of death, and that he "was fully conscious of that fact, not as a thing of surmise and conjecture or apprehension, but as a fixed and inevitable fact." We all

know how readily from the lips of the sick and the suffering, come the words, oft repeated, "I shall never recover," "I shall die," when no real expectation exists of such a result. Any one who has stood by the bedside of the ill and heard these words, if at last the attending physician pronounced the fatal sentence, "you must die," knows the change that came over the face of the sufferer. The light fades from the eye, and the flush from the cheek, as hope for the first time deserts the patient. Such expressions of mere impatience and restlessness are not a sufficient foundation for a court to rest a safe conclusion upon as to the actual condition of the speaker's mind. Far from clearly establishing the fact that all hope has fled and that immediate dissolution is expected, they can hardly be said to create a presumption that such is the actual condition of the mind.

It seems impossible to deny that the court committed error in allowing the statements of Petri to go to the jury as dying declarations.

This error having occurred, did it harm the appellant? The presumption is that it did; and unless it clearly appears that it did not, we must reverse the case. Indeed, the only ground upon which this error can be treated as harmless is, that subsequent testimony supplied the defective proof and justified the action already taken by the court.

In the course of his examination in chief, Charles May stated, that he was a brother-in-law of the deceased; that when he saw him on Sunday afternoon he asked him, "What's the matter?" Petri answered, "Charley, I am in a bad fix; go for a doctor." "I went for a doctor; got a doctor and went home; went and saw him again. He told me that he believed he would die. This was Sunday afternoon. John told me an hour before that he would die." Moritz Hosmour testified, that Petri told him, "he had given up all hopes." This was about two o'clock Sunday afternoon.

Dr. Armstrong testified, that he saw Petri about three

o'clock Sunday afternoon. He called again at five o'clock, and at eleven o'clock at night, and the next morning at five; and the last visit was made at three o'clock Monday afternoon. He states, "I do not remember whether he said he was in fear of dying or not. The character of the wound led me to believe it would prove fatal. I was not satisfied that it would prove so, at my first sight. It is hard to determine how long it may be before a wound may terminate fatally. Sloughing produces secondary hemorrhage."

In this evidence we have the statement of Petri, that he "had given up all hope," and yet with this comes his call for a physician; and though not much is to be rested upon this fact, still it may not be unreasonable to infer that some hope of aid still existed. Then, too, the physician who examined him at three o'clock cannot recall that Petri even expressed a fear of dying, nor was the doctor himself enabled to determine the condition of his patient. And can it be supposed that under such circumstances the physician gave his patient no encouragement—animated him with no hope, while his friends were about him? This seems to fall far short of the proof required.

In *Rex v. Crockett*, 4 Car. & P. 544, the surgeon testified, "I had told the deceased she would not recover, and she was perfectly aware of her danger. I told her I understood she had taken something. She said she had, and that damned man had poisoned her. I asked what man, and she said Crockett. She said, she hoped I would do what I could for her, for the sake of her family. I told her there was no chance of her recovery." BOSANQUET, J., said, "This shows a degree of hope in her mind. To render a declaration of this kind admissible, the deceased must have had the impression on her mind of an almost immediate dissolution."

Giving full weight to the after fact, that Petri did die about six o'clock on Monday evening, would it be reasonable to assert from the evidence, that it clearly appears that he apprehended even, much less was absolutely assured of

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immediate death? In *Rex v. Van Butchell*, 3 Car. & P. 629, the deceased declared to his surgeon that he had such an injury in the bowels (having been operated on by a quack) that he would never recover. The surgeon endeavored to encourage him, really thinking him not in danger of dying, but he persisted in saying he felt satisfied he should never recover. HULLOCK, B., rejected the proposed declaration as evidence.

In the case of *The King v. Spilsbury*, 7 Car. & P. 187, it was proposed to give in evidence the dying declaration of a deceased person, and it was proved, that about the time of making the declaration, the deceased was asked, if he thought he should recover and how he was; to which he answered that he thought he should not recover, as he was so very ill. He had been previously insensible, but remained sensible for an hour and died the next day. The evidence was rejected by COLERIDGE, J., on the ground that he did not feel fully convinced that the deceased had no hope of recovery.

In *Regina v. Megson*, 9 Car. & P. 418, in a case of murder, it appeared that two days before the death of the deceased, the surgeon told her that she was in a very precarious state; and that on the day before her death, when she had become much worse, she said to the surgeon, that she found herself growing worse and that she had been in hopes she would have got better, but as she was getting worse she thought it her duty to mention what had taken place. Immediately after this she made a statement. ROLFE, B., said, "I think it does not sufficiently appear that the deceased was without hope of recovery. I think that I ought not to receive the evidence."

In the case of *Rex v. Bonner*, 6 Car. & P. 386, cited in the dissenting opinion, it will be observed that PATTESON, J., states of the person who made the declaration, "It is quite clear that he did not expect to survive the accident; and it is evident that he thought on the Wednesday that he might die on that day." As the statement was made on Wednes-

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day when under expectation of death that day, the case seems to come within the rule.

But the cases we have cited establish the rule and exhibit the extreme caution observed by courts of the highest reputation in restricting evidence within its limits. The reason of this strictness is evident. The inevitable condition of the wounded sufferer, the natural inclination to justify one's own conduct, the disposition to condemn another as the cause of one's suffering, the presence of sympathizing friends, the strong sense of wrong and outrage, the feelings of anger and revenge—all these are not calculated to induce a calm, true, unbiased statement from the injured party. To overcome these, there is not even the sanctity of an oath; nothing, indeed, but the certain looking for of death, inevitable and immediate. This alone can be looked to as securing truth, when there is no oath, no cross examination, no confronting of witnesses.

The only safe rule for the admission of such declarations is, that the declarant must be fully persuaded that death is rapidly approaching; that it is so near that all motives to falsehood are superseded by the strongest motives to strict veracity; and that the proof render this condition of the mind clear to the judge before whom it is offered. And as the chief value of the law rests in its faithful administration, this rule cannot bend to cases of seeming hardship. In the present instance, the State has the declarations of the deceased made a few hours before his death, when the physician states he was in a dying condition.

The statements made on Sunday afternoon should have been rejected.

The appellant presents a bill of exceptions containing the instructions given by the court to the jury. The only statements in regard to the punishment to be inflicted in the event of a conviction for murder in the first degree are contained in the following instruction:

“Murder in the first degree is defined as follows: ‘Sec. 2. If any person of sound mind shall purposely and with pre-

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meditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill any human being, such person shall be declared guilty of murder in the first degree, and upon conviction thereof shall suffer death.' The only portion of the section applicable to the case now under consideration is embraced in the following words, to wit: 'If any person of sound mind shall purposefully and with premeditated malice, kill any human being, such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death.' "

The appellant insists that the jury should have been informed that the statute provides, that "any person convicted of treason, or murder in the first degree, may instead of being sentenced to death, in the discretion of the jury, be imprisoned in the state prison during life." 2 G. & H. 437, sec. 4. The record, however, shows that the exceptions were taken by presenting the bill of exceptions pending the motion for a new trial; and as there is a question made whether this can be regarded as at the proper time, within the provisions of the statute on the subject in criminal cases, we do not discuss the question, as the case must be reversed for the error in admitting the statements of Petri made on Sunday afternoon.*

Judgment reversed, and cause remanded for a new trial.

GREGORY, J.—I am very clear that the judgment in this case ought to be affirmed.

The facts, in my opinion, make a case of murder in the first degree, and are of a character to justify the infliction of the highest penalty of the law.

*NOTE, by RAY, J.—Since the above opinion was filed, it has been brought to our notice, by the submission of the original record in this case, that the bill of exceptions presented by the transcript does not include all the instructions given by the court below, and that among the omitted instructions was one properly informing the jury as to the punishment authorized by law for murder in the first degree. We make this statement in justice to the learned judge who presided below, although the information reaches us in such form that we cannot officially recognize the fact.

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The defendant entered the house of the deceased and committed a felony, was detected after perpetrating the crime, and to enable him to make his escape, he shot the deceased with a revolver, with which he was armed, inflicting a mortal wound, of which the deceased died in about twenty-nine hours.

I differ with the majority on the application of the rule as to the dying declarations.

The deceased was shot through the body and also in the jaw; in a struggle with the prisoner he had bled freely from his wounds; he had pursued the appellant for about a quarter of a mile, had returned to his house, and was in bed; he sent for a doctor; he said he was in a bad fix, that he thought he should die, that he had given up all hope.

The medical witnesses concurred in saying that the wounds were mortal. It is true, that the attendant physician was not clear in his mind at his first visit that the wounds were mortal, but he became satisfied the same day that they were so. It is very clear to my mind that the deceased, at the time he made the declarations introduced in evidence, was laboring under apprehension of almost immediate death.

In *Rex v. Bonner*, 6 C. & P. 386 (25 E. C. L. 487), the deceased had met with an accident, which happened about two o'clock on the morning of Sunday, the 11th of August, 1833. The surgeon stated that he attended the deceased on Sunday, the 11th, when he found him with six ribs broken, and other injuries; that he informed the deceased that he could not expect to recover. Beavan (the deceased) replied, that he was aware he must go out of the world unless he was relieved by medicine; that he was better on Monday, but passed a very bad night on Tuesday; and that on Wednesday he was very ill, and said he was satisfied that he must go out of the world. A clergyman also stated, that the deceased told him on Wednesday, that he did not expect to live. A brother and a son-in-law of the deceased also stated, that they were sent for by the deceased and saw

him on the Wednesday, when he expressed his great anxiety to settle his worldly affairs, as he had not long to live. He died on the following Saturday. It was contended for the prisoner, that the fact that the deceased did on the Sunday express himself in terms which clearly showed that he hoped to recover, and the fact that he did live until the Saturday, made the dying declarations not receivable in evidence.

• PATTESON, J., (who tried the case) said, "I think that I am bound to admit the declarations of the deceased. It is quite clear that he did not expect to survive the accident; and it is evident that he thought on the Wednesday that he might die on that day. *It is not necessary to prove expressions of apprehension of immediate danger*; and the circumstance that he lived until Saturday did not alter the state of things on the Wednesday."

In the case under consideration, the nature of the wounds, the declarations of the deceased, and the short time he lived, were all matters to be considered in determining the question as to whether he was laboring under the apprehension of "almost immediate death." Under the rulings in all the cases on this subject, if it had been proved to the satisfaction of the judge trying the case that the deceased was, at the time he made the declarations in question, laboring under the apprehension that he would die within the then next twenty-eight hours, then they would undoubtedly have been proper testimony to go to the jury.

The nature of the injury, the short time the deceased lived, his expressions, that he "did not expect to recover," "that he had given up all hope," satisfy me that the court below committed no error in admitting the evidence. Indeed, I do not see, under the rulings, how the court could have done otherwise.

The rule is a reasonable one, and is as old as the common law; it only applies to cases of homicide. The felon by whose unlawful act the tongue of his victim has been silenced in death has no great right to complain.

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There is no reason why the rule should be so restricted in its application as to make it of little or no practical use.

I am of opinion that the instructions of the court to the jury are not properly in the record.

Of course, when I say that the judgment ought to be affirmed, it is in view of the legal presumption that the court properly directed the jury as to the law of the case.

T. J. Forest, W. E. McLean, and — Simpson, for appellant.

D. E. Williamson, Attorney General, *B. W. Hanna, J. P. Baird, D. W. Voorhees*, and *J. M. Allen*, for the State.

See note on page 521, *post*.

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CARRIER.—Collections.—Bill of Lading.—A bill of lading recited, that the goods were "to be delivered without delay, &c., at the port of, &c., to, &c., or assigns, he or they paying freight for said goods at the rate of, &c.; charges payable when collected by boat; charges to be collected" a certain sum, being the value of the goods.

Held, that if the carrier delivered the goods without collecting such charges, he was liable therefor to the person who so contracted with him and delivered the goods to him.

APPEAL from the Vanderburgh Circuit Court.

RAY, J.—The appellant brought this action against the appellees, charging, that at their special instance and request he had delivered to said appellees certain goods and chattels and merchandize, described in a bill of lading, which was executed by said appellees and delivered to the appellant; that the goods were of the value of \$274.40, and were to be carried by the appellees in and by a certain steamboat from Evansville to, &c., and delivered to, &c., for certain freight and reward to the appellees; that by said bill of lading the appellees agreed to collect the sum of \$274.40,

charges upon said goods, from, &c., upon delivery of said goods, and pay the said sum to the appellant; and although the appellees made said delivery, yet they failed and refused to collect said sum and pay the same to the appellant.

A second paragraph was filed, alleging, that although a reasonable time had elapsed since the delivery, the appellees failed and refused to pay the said sum to the appellant. The material portion of the bill of lading is as follows: "To be delivered without delay, &c., at the Port of Rose Clair, Illinois, to I. N. Watington, or assigns, he or they paying freight for said goods, at the rate of ———. Charges payable when collected by boat." And at the conclusion of the bill of lading: "Charges to be collected, \$274.40."

A demurrer was sustained to each paragraph of the complaint.

The plain and reasonable intent of the language used in the bill of lading is, that the charges are to be collected by the appellees; and as they have, as is charged by the complaint, delivered the goods without collecting the charges, thereby surrendering a security without authority, they are liable for the charges they assumed to collect.

The appellees insist that the appellant does not show by his complaint that the charges are due to him. He does aver the delivery by him of the goods, and the contract was between him and the appellees. To him they must answer the breach.

Judgment reversed, with costs, and the cause remanded, with direction to overrule the demurrer to each paragraph of the complaint.

C. Denby, for appellant.

A. Iglehart and *T. E. Garvin*, for appellees.

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CRIMINAL LAW.—*Information.—Uncertainty.*—An information in which the district attorney charges the offense, "as he verily believes," is bad on motion to quash.

APPEAL from the Kosciusko Common Pleas.

GREGORY, J.—The information by the district attorney charges, that on or about the 15th day of April, 1868, at, &c., one John W. Vannatta did then and there, unlawfully and feloniously, with intent then and there to injure and kill America Horn and six others named, "mingle and mix a certain deadly poison, known as arsenic, in quantities sufficiently large to produce death, with water, with which said arsenic was so mingled would then and there be drank by said persons named and taken into their stomachs, and that said persons would be thereby and therefrom poisoned and killed, as he verily believes."

A motion was made to quash the information, and overruled, and this presents the first question raised by the assignment of errors.

Several objections are taken to the information. 1. That the quantity of arsenic is too indefinitely stated. 2. That the water with which the arsenic was mingled is not defined; nor is it shown how it was possible or likely that it would be drank by the persons named. 3. That the charge is not direct and positive, but as the district attorney verily believes.

The code has made some changes in the strict rules of the common law as to pleading in criminal cases, but it requires that "the indictment or information must be direct and certain, as it regards the party, and the offense charged." 2 G. & H. 402, sec. 55.

That the charge in the case at bar is not direct and certain, is clearly settled, to our minds, in *Commonwealth v. Phillips*, 16 Pick. 211.

An affidavit on information and belief is sufficient to warrant the issuing of process and the arrest of the offender, but it is not sufficient in an indictment or information.

The charge must be that the defendant committed the crime, not that he is guilty as the district attorney verily believes.

A verdict that the defendant is guilty as charged would amount to nothing. It would only show that the district attorney believed that the offense had been committed.

The information is vague and uncertain in other particulars; but as it is not the province of this court to point out what would be a good information in this case, we have discharged our entire duty when we find the information bad.

As the trial was on a bad information, the other questions made by counsel become unimportant.

Judgment reversed, and the cause remanded, with directions to quash the information.

G. W. Frasier, for appellant.

D. E. Williamson, Attorney General, for the State.

STUDABAKER and Others v. WHITE.

LIQUIDATED DAMAGES.—Where a party covenants for the abstaining from doing, or for the performance of, some particular act or acts which are not measurable by any exact pecuniary standard, and it is agreed that the party so covenanting shall pay a stipulated sum for a violation of any of such covenants, that sum is to be deemed liquidated damages, and not a penalty.

SAME.—Bond.—Restraint of Trade.—Liquor Traffic.—Bond for \$1,000, conditioned that the obligor should sell no more spirituous or malt liquors or wine, within a county named, after a specified date, or cause the same to be sold within said county, either directly or indirectly, after the time specified, or manufacture or obtain any spirituous or malt liquors or wine, or cause to be sold, in said county, by himself or any other person, either di-

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rectly or indirectly, after said date; that he should settle a certain obligation calling for liquors, payable to a third person named, of a certain sum mentioned, so that the liquors should not be brought to a town named, in said county; and should use his influence to prevent any person or persons from bringing any of the aforesaid liquors to said town with the intention of selling the same within the town.

Held, that such a bond is valid in this State.

Held, also, that said sum of \$1,000 was liquidated damages, and not a penalty.

Held, also, that the failure of the obligor to deliver any liquor in fulfilment of his contract with such third person, would not have been a breach of the condition of the bond.

APPEAL from the Wells Circuit Court.

RAY, J.—Action by the appellants for breach of a bond executed by the appellee.

The condition of the bond is, "that J. G. White is to sell no more spirituous or malt liquors or wine, within the county of Wells, State of Indiana, after the 4th day of March, 1859, nor cause the same to be sold within the said county, either directly or indirectly, after the said time specified. And the said White is further bound to neither manufacture or obtain any spirituous or malt liquors or wine, or cause to be sold in said county aforesaid by himself or any other person, either directly or indirectly, after the 4th day of March, 1859. The said J. G. White is further bound to settle a certain obligation calling for liquors payable to Joseph Richey of the sum of \$177.57, so that the whiskey or liquor is not to be brought to the town of Bluffton, of the county of Wells, State of Indiana; and further, to use his influence to prevent any person or persons from bringing any of the aforesaid liquors to the aforesaid town with the intention of selling the same within the town aforesaid."

The sum named in the bond is one thousand dollars. The breach charged is selling spirituous liquors within the town. No special damages are alleged.

The appellee filed a second paragraph of answer, averring that only nominal damages had been sustained. A demurrer was overruled to this paragraph.

On the trial the court instructed the jury, that if White

“failed to settle the obligation referred to,” it would be a breach of the bond; and that as no special damages had been proved, the recovery could not exceed a nominal sum.

We assume the statement, that a failure to settle the obligation would be a breach of a condition of the bond, to have been an inadvertent use of words, as the stipulation is very plain that the obligation is to be so settled that the liquor will not be brought to the town of Bluffton. We suppose his failure to deliver any liquor in fulfilment of his contract would comply with his bond to the appellants. The validity of a bond like this has been heretofore decided. *Harrison v. Lockhart*, 25 Ind. 112.

Were the damages in this contract liquidated or in the nature of a penalty?

It is insisted that the violation of the condition that White will “use his influence to prevent any person from bringing any of the aforesaid liquors to the town aforesaid, with the intention of selling the same within the town,” would result in much less injury than a breach of other conditions, and therefore a single sum could not have been intended as the stipulated amount in either case.

In *Galsworthy v. Strutt*, 1 Exch. 658, covenant on an indenture for the dissolution of copartnership between the plaintiff and defendant as attorneys and solicitors, Strutt promised and agreed that he shall not, nor will at any time or times hereafter, within the next seven years, directly or indirectly, either by himself or in copartnership with another or others, carry on the said practice, profession, or business of an attorney or solicitor within the distance of fifty miles from, &c., nor interfere with, solicit, or influence the clients of the said late copartnership. The sum of £1,000 was fixed as “liquidated damages” for a breach of the covenant. Breach assigned, practicing as an attorney within fifty miles, &c.

PARKE, B., said, “I take it to be clear that upon the true construction of this covenant, the defendant would not be bound to pay more than £1,000; that is, in case he should

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violate either of those two or three matters mentioned in the covenant. These matters are each of them incapable of exact estimation. It cannot be said what damage a person may sustain by another setting up in business within a limited period of time or distance, nor how much he may be injured by the loss of one of his clients. The loss may be either great or small; and therefore, in order to avoid all dispute, the parties are content to fix a certain sum, namely, the sum they have mentioned in express terms in their agreement. Now it is perfectly competent to parties to make a stipulation to pay a fixed sum for the breach of a covenant, the damage arising from which it is extremely difficult to ascertain; and I think it is not an unreasonable stipulation which the defendant has made, that he should pay £1,000 upon the event of either of the matters mentioned in this agreement."

ALDERSON, B., inquired, "where the damage cannot be ascertained, what absurdity is there in a party saying there shall be a fixed sum? and therefore in such case the courts may give the words their plain and ordinary meaning. The amount of damage which a person might sustain by another's practicing within fifty miles for the period of seven years, would not be the same in amount as if he were to practice within forty miles, or next door, nor the same if he had set up in business the first, second, or sixth year. In one case the damages might be small, and in the other large; but the parties have agreed to a certain fixed sum."

Had the appellants' counsel favored us with a reference to this case, its aptness would have induced a suspicion that the agreement therein used had served as a text for the conditions of the bond in judgment.

The rule in the construction of these contracts is, that if the agreement consist of one or more stipulations, the breach of which cannot be measured, then the contract must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty. *Mayne Dam. 67*; *PARKE, B., in Atkyns v. Kinnier, 4 Exch. 776; Cotheal v.*

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Talmage, 5 Seld. 551; *Grasselli v. Lowden*, 11 Ohio St. 349; *Sedgw. Dam.* (4th ed.) 472; *Hamilton v. Overton*, 6 Blackf. 206; *Duffy v. Shockey*, 11 Ind. 70.

Where the covenant is for the abstaining from doing some particular act or acts, or for their performance, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum for a violation of any of such covenants, that sum is to be deemed liquidated damages, and not a penalty. *Bagley v. Peddie*, 5 Sandf. 192.

The sum named in this case is to be regarded as liquidated damages, and any violation within the plain intent and purpose of the contract authorized such recovery. The instruction was erroneous.

The demurrer should have been sustained to the second paragraph of the answer. The non-performance of the covenant imports damage. *Atkins v. Kinnier*, *supra*.

Judgment reversed, with costs, and the cause remanded for a new trial.

L. M. Ninde, *R. S. Taylor*, and — *Robertson*, for appellants.

D. Studabaker, for appellee.

GORRELL v. SNOW.

MALICIOUS PROSECUTION.—*Pleading*.—In a complaint for malicious prosecution the plaintiff must aver that the prosecution claimed to have been malicious has terminated in his acquittal or discharge.

APPEAL from the Wells Circuit Court.

Action by the appellee against the appellant. The complaint was in two paragraphs, a demurrer to each of which

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was overruled. An answer of general denial was filed, and the issue thus formed was tried by a jury. Verdict and judgment for the plaintiff.

FRAZER, J.—The only question before us is, did the court below err in overruling a demurrer to the second paragraph of the complaint? The action was for malicious prosecution, and that paragraph failed to aver that the prosecution claimed to have been malicious had terminated in the plaintiff's acquittal or discharge. For this omission the appellant insists that the paragraph was bad. So are the authorities. 1 Chit. Pl. 679; *Whitworth v. Hall*, 2 B. & Ad. 695.

Reversed and remanded, with direction to sustain the demurrer.

J. R. Coffroth, for appellant.

GREENWALD v. KAPPES.

PARTY WALL.—*Contract.—Construction of.*—A. purchased of B. a portion of a certain lot, a part of the consideration, as shown by a written agreement between said parties, being that A. promised to build thereon within a short time a first class three story brick building; and it was agreed that one of the walls of the building should be a party-wall, each owning one moiety thereof and giving an equal amount of the ground; and that "whenever B. or his heirs or assigns use said wall by erecting a building on the lot adjoining on the said A.'s, B. or his heirs or assigns putting the joists of their building in said wall, then said A. or his heirs or assigns is to receive one-half of the actual cost of the building of said wall from B. or his heirs or assigns." A. complied with his contract by erecting a three story brick building, leaving joist-holes. B. erected a two-story brick building capable of lasting many years, using the party-wall as one of the walls of his building, but did not insert his joists therein.

Held, in a suit by A. against B. upon the written agreement, to recover one-

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half the cost of the party-wall, that the use of the wall was the thing contracted for, and that putting the joists into it was only an incident.

APPEAL from the Marion Common Pleas.

GREGORY, J.—Suit by Greenwald against Kappes, to recover one-half of the cost of a party-wall. The complaint is in two paragraphs. The first avers, that Greenwald purchased of Kappes a part of a certain lot in Indianapolis; that it was a part of the consideration of the sale, that Greenwald promised to build thereon, within a short time, a first class three story brick building; that it was agreed between the plaintiff and defendant that the west wall of Greenwald's house should be a party-wall for Kappes' building whenever the same was erected, each owning one moiety of the wall, giving an equal amount of ground, and contributing equally to the cost of erecting the same, Greenwald agreeing to build the wall and wait on Kappes for his half of the cost till he built on his lot adjoining; that Greenwald had performed the conditions of the agreement on his part; that Kappes had built upon his lot adjoining, a permanent and substantial two-story brick building, using the party-wall; that the wall cost \$1,519.40; and that Kappes refused to pay his part.

The second paragraph alleges, that Greenwald, subsequent to the written agreement, agreed with Kappes, verbally, to erect a joint column for said wall; that Kappes promised to pay for half of it; that Greenwald erected the column, at a cost of \$90.12; and that Kappes refused payment.

A demurrer to the first paragraph of the complaint was overruled, and the defendant answered: first, by the general denial; a second paragraph was stricken out on motion; third, that the defendant still owns the lot adjoining plaintiff's and has never used the joint wall by erecting a building thereon by inserting joists in the wall.

A demurrer to the third paragraph of the answer was sustained.

Trial by the court; finding for the defendant. The plaintiff

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iff moved for a new trial, which was overruled. The evidence forms a part of the record, being incorporated therein by a bill of exceptions.

The turning point in the case is the construction to be given to the written agreement, the foundation of the first paragraph of the complaint.

That part of the agreement on which the controversy arose is as follows: "And it is further agreed upon, that whenever said Kappes on his heirs or assigns use said wall by erecting a building on the lot adjoining on the said Greenwald's, the said Kappes or his heirs or assigns putting the joists of their building in said wall, then said Greenwald or his heirs or assigns is to receive one-half of the actual cost of the building of said wall from said Kappes or his heirs or assigns."

Greenwald complied with his contract by erecting a three-story brick building, leaving joist-holes. Kappes erected a two-story brick building on his lot adjoining that of Greenwald, using the party-wall as one of the walls of his building, but did not insert his joists therein. There is some conflict in the evidence as to whether Kappes' building is a permanent one. There is no conflict, however, in the testimony as to the fact that the building is of brick, and built in such a manner as to be capable of lasting for a series of years.

Was the money due under the contract at the commencement of the suit? is the question in the case.

We do not think the contract will bear the construction claimed for it by the appellee. It is very clear to our minds, that the use of the party-wall was the thing contracted for; putting the joists into the wall was only an incident. Any other construction would put it in the power of the appellee to commit the grossest fraud. The rule is well stated by Coke thus: "Whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrong-

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ful and against law, the intendment that standeth with law shall be taken." Co. Litt. 42, 183.

Greenwald acted in good faith on his part by leaving holes in the party-wall for the insertion of the joists; if Kappes elected to turn his joists the other way, it was no fault of the former.

The court erred in overruling the motion for a new trial.

Judgment reversed, with costs; cause remanded, with direction to grant a new trial, and for further proceedings.

H. C. Guffin, R. P. Parker, J. L. Ketcham, and J. L. Mitchell, for appellant.

A. G. Porter, B. Harrison, and W. P. Fishback, for appellee.

DeMOSS and Others v. NEWTON and Another.

STATUTE OF LIMITATIONS.—Reasonableness of Time.—Where a right springs, not from a contract, but from legislative enactment, the action to enforce a claim under such enactment may be limited by law; and the legislature is the exclusive judge of the reasonableness of the time allowed within which the action may be brought.

SAME.—Minors.—No exception can be claimed in favor of minors, unless they are expressly mentioned by the statute as excepted.

SAME.—Descent.—Widow.—A man died in 1854, seized in fee simple of certain real estate, leaving surviving him a widow and brothers and sisters, but no child, or father, or mother. The widow took possession of the entire property. Suit for partition, the plaintiffs claiming title to an undivided interest in the land as brothers and sisters of the deceased.

Held, that it was a sufficient answer, that before the commencement of the action more than ninety days had elapsed from the 9th of March, 1867, when section 3 of the act of March 4th, 1853 (Acts 1853, p. 55), was repealed and a limitation fixed to the right of action under its provisions. (Acts 1867, p. 204.)

APPEAL from the Wayne Common Pleas.

Suit by the appellants against the appellees for partition of lands.

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RAY, J.—The appellants claim title to an undivided interest in certain real estate, as brothers and sisters, and therefore heirs, of Nathan Clark, who died in October, 1854, leaving no father, mother, or children surviving, but leaving a widow who took possession of the entire property.

The claim of the appellants rests upon the third section of the act of March 4th, 1853, amending sections 18, 24, 25, and 26, of the "act regulating descents and the apportionment of estates." Acts 1853, p 55.

The appellees answered, that more than ninety days had elapsed since the 9th day of March, 1867, when the act of 1853 was repealed and a limitation fixed to the right of action under its provisions. Acts 1867. p. 204.

A demurrer was overruled to this answer, and judgment entered for the appellees.

In the case of *Leard v. Leard*, 30 Ind. 171, we held this limitation was valid. The act of 1853 was in full force up to the 9th day of March, 1867, and an additional time was then given within which to commence suits for rights acquired under it.

But appellants insist that the limitation of the right of action to ninety days is unreasonable and in effect divests rights which are vested by law, and it is therefore said to be in conflict with the Constitution of the United States protecting private property. It should be observed, however, that the right here claimed does not arise out of contract, but is conferred by law, and therefore subject to the general control of the power which gave it. In the case of *Satterlee v. Matthewson*, 2 Pct. 380, 413, Mr. Justice WASHINGTON disposes of this question thus: "The objection, however, which was most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law

upon this ground; provided its effect be not to impair the obligation of a contract."

But before any such an objection could be seriously urged against the law, the court must determine that the limitation to the right of action is an unreasonable one. There is a time given, and the law as stated by high authority seems to be, that "what shall be considered a reasonable time must be determined by the legislature, into the wisdom of whose decision in establishing a legal bar it does not pertain to the jurisdiction of the courts to enquire." Cooley Const. Lim. 366. In *Call v. Hagger*, 8 Mass. 423, the court say, "It must be left to the discretion of the legislature to fix the proper limitations;" and in *Smith v. Morrison*, 22 Pick. 430, "whether the time allowed for creditors to commence their actions was a reasonable time or not, was a question within the exclusive province of the legislature to determine."

There is a case in our reports, where the court held that they would allow a reasonable time after the act took effect, for the commencement of suits on causes of action which had already accrued. *State v. Swope*, 7 Ind. 91. The rule was applied to a right existing under a contract, and was most unfortunate in its citation of authority to sustain it, quoting the case of *Peirce v. Tobey*, 5 Met. 168, which rests upon the case already cited of *Smith v. Morrison*, which declares the legislature to be the exclusive judge of the length of time proper to limit the right of action.

The Supreme Court of Kentucky ruled otherwise in a case involving a right of action under a contract. *Berry v. Ransdall*, 4 Met. Ky. 292; *Pearce's Heirs v. Patton*, 7 B. Mon. 162. The latter case, however, ruling that a legislature cannot give effect to the invalid execution of a contract or limit the bringing of an action to avoid such a contract, is in direct conflict with *The State v. Bennett*, 24 Ind. 383; *Maxey v. Wise*, 25, Ind. 1; *Tate v. Stooltzfoos*, 16 S. & R. 35; *Hepburn v. Curts*, 7 Watts, 300; *Goshorn v. Purcell*, 11 Ohio St. 641; *Foster v. Essex*, 16 Mass. 245; *Raverty v. Fridge*, 3 McLean, 230.

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The only point, however, that we rule in this case is, that where a right springs, not from contract, but from legislative enactment, the action to enforce a claim under such enactment may be limited by law; and the legislature is the exclusive judge of the reasonableness of the time allowed within which the action may be brought.

The appellants, however, insist that the act does not apply to minors, but that they may sue without regard to the limitation. The act contains no exceptions, and the rule is, "that no exception can be claimed, unless expressly mentioned." Angell Lim. §§ 194, 485; *M'Iver v. Ragan*, 2 Wheat. 25; *Beckford v. Wade*, 17 Ves. 88; *Beardsly v. Southmayd*, 3 Green (N. J.), 171; *The Sam Slick*, 2 Curt. C. C. 480; *Bucklin v. Ford*, 5 Barb. 393; *Howell v. Hair*, 15 Ala. 194.

In Illinois, in certain cases, upon the death of the owner of the title to land, the minor heirs, *feme coverts*, or persons *non compos* cannot take any steps for the recovery of the property, and yet the statute having commenced to run continues against them, and this limitation is sustained by the courts. *Stearns v. Gittings*, 23 Ill. 387.

The court committed no error in overruling the demurrer.

Judgment affirmed.

J. B. & J. F. Julian, for appellants.

L. D. Stubbs and J. P. Siddall, for appellees.

LINGERMAN and Another v. NAVE.

PRACTICE.—*Supreme Court.—New Trial.—Assignment of Errors.*—Where in an assignment of errors the only errors complained of relate to matters occurring on the trial for which a new trial was prayed, but the action of

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the court in overruling the motion is not assigned for error, no question is properly raised in this court.

APPEAL from the Hendricks Common Pleas.

ELLIOTT, C. J.—Suit by Nave against the appellants, on a promissory note. Issues were formed, the trial of which resulted in a finding and judgment for the plaintiff below; a motion for a new trial being overruled.

The judgment must be affirmed. The only errors complained of relate to matters occurring on the trial, and for which a new trial was prayed; but the action of the court in overruling the motion for a new trial is not assigned for error. No question, therefore, is properly raised by the assignment of errors.

The judgment is affirmed, with costs and ten per cent. damages.

J. S. Straughan, for appellants.

C. C. Nave, for appellee.

HAGEN and Another v. GROSSMAN.

SALE.—Deceit.—Where a seller of goods knowingly makes false representations to the buyer as to their quality, but the buyer does not rely upon such representations and is not deceived thereby, the seller is not liable in an action for deceit.

SAME.—Where a seller has made false representations as to the quality of the goods, but the buyer, in making the purchase, relies on a test of their quality made by his own agent who is not prevented by any act or word of the seller from testing the goods, the seller is not liable for deceit.

SAME.—Evidence.—Examination of Goods by Jury.—Upon the trial of an action for deceit in the sale of a quantity of flour, its quality at the time of sale being in question, the court refused to permit the flour to be examined by the jury, to test its odor.

Held, that it was properly excluded.

Hages and Another v. Grossman.

INSTRUCTION TO JURY.—There is no error in refusing to give to the jury an instruction asked by a party which is not pertinent to the issues.

APPEAL from the Miami Circuit Court.

Suit by the appellants against the appellee. The complaint alleges, that the plaintiffs were engaged in the business of baking bread for sale to the public, which was well known to the defendant; that the defendant, fraudulently and craftily, intending to cheat and defraud the plaintiffs, brought to their bakery twelve hundred pounds of flour, in sacks, which he falsely and fraudulently represented to the plaintiffs to be good, sound, merchantable flour, when, in fact, said flour was musty, worthless, and wholly unfit to be used in said business, which the defendant well knew; that the plaintiffs at the time paid the defendant seventy-five dollars for said flour, being \$6.25 per hundred, relying on said representations of the defendant, and believing the same to be true; that after they had paid for the flour, they discovered it was worthless for the purpose for which it was purchased, and thereupon they offered to return it to the defendant, who refused to receive it or to repay said sum or any part thereof; whereby the plaintiffs were damaged, &c.

The defendant answered in two paragraphs: first, the general denial; second, that before the sale of the flour to the plaintiffs the defendant took it to their place of business, in sacks, and left it there for several days for them to inspect and try it; that after the plaintiffs had done so and knew the quality of the flour, he sold it to them at \$6.25 per hundred, the price agreed upon between the parties, which was less than the market price at that time and place for good, merchantable flour.

Reply, the general denial. Trial by jury; verdict for the defendant, on which judgment was rendered, a motion for a new trial having been overruled.

RAY, J.—The appellants urge a reversal of this case upon the evidence. The only question before the jury was whether the appellants relied upon false representations of

the quality of the flour or purchased it upon their own judgment. The flour was left with them for examination for ten or twelve days, and they used one sack from among the lot; and although there is evidence that the flour from the sack used made good bread, and that from the other sacks did not, when used at a subsequent time, make bread fit for sale, still the jury might fairly find from the evidence in the case, that the flour was all of one quality when sold, being but one lot of flour, from the same lot of wheat, and ground at the same time, the sacks being filled from the mill.

We cannot disturb a finding for either party upon such evidence.

It is objected, that the court refused to permit the flour in question to be examined by the jury, that each jurymen might personally test its odor.

The witnesses for the appellant stated, that it gave out a stronger smell when offered in evidence than when purchased, and it might be somewhat difficult by a bill of exceptions to introduce such evidence into this court. It was properly excluded from the jury.

The appellant objects that the following instruction is not pertinent to the case as made by the evidence, and is ambiguous. It was given at the request of the appellee..

"If you find that the flour in question, at the time of the sale, was not good, sound, merchantable flour; that the defendant at or before the sale represented to the plaintiffs that it was of that quality, knowing that such representation was false; yet the plaintiffs cannot recover, if you find that in the purchase of the flour they did not rely upon such representations of the defendant and were not deceived thereby." If this be construed to mean that the defendant represented the flour as not sound, the appellants could not be injured. If, as it clearly intends, the flour was represented as sound when it was not, but the representa-

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tion did not deceive the appellants, the instruction is both pertinent and correct.

This instruction was also given to the jury: "If the jury find that the flour in question was left in the possession of the plaintiffs, for the purpose of being tested by their baker as the agent of the plaintiffs, as to its quality for the purpose for which they wanted it, and the defendant was not guilty of making any false or fraudulent representations or acts at the time, which the plaintiffs relied on as true, by which they were prevented from making such test, and after such test under such circumstances, the plaintiffs, relying upon the judgment of their baker as to the quality of the flour, purchased of the defendant, they cannot recover, although it be true that the defendant had previously made false representations as to the quality of the flour."

If by no act or word of the defendant the baker was prevented from testing the flour, and if the plaintiffs relied upon that test in making their purchase, they could not have rested upon the statements of the defendant, and he could not be liable for deceit.

The appellants asked the court to instruct the jury, that an offer to sell provisions for domestic use is an implied warranty of their soundness. As the complaint was for deceit, and not upon a warranty, either express or implied, the instruction was correctly refused. The court, however, gave the instruction, with the qualification, that the purchaser did not examine and rely upon such examination of the quality of the article sold.

The second instruction asked by the appellants omits to limit the recovery of damages to the injury resulting from deceit, but holds the appellee liable for concealment of defects, without requiring that the appellants should have relied at all upon the conduct or statements of the appellee. It was properly refused.

The sixth instruction given by the court informed the jury, that if "the plaintiffs relied exclusively upon" false representations made by the defendant, they were entitled

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to recover. This certainly was correct. In such a case the plaintiffs should certainly recover. The instruction did not, however, limit the recovery to this state of facts.

The other instructions embraced in the abstract relate to the measure of damages upon a recovery by the appellants, and the event of the trial has rendered them unimportant.

Judgment affirmed, with costs.

J. M. Wilson and O. Blake, for appellants.

N. O. Ross and R. P. Effinger, for appellee.

GWALTNEY, Guardian, v. CANNON.

PLEADING.—*Complaint.*—*Promise.*—*Guardian and Ward.*—A complaint against a guardian, to recover for maintaining and providing for his ward, did not contain any averment of a request or promise made by the defendant, or any allegation that he had failed to provide, within the means in his hands as guardian, for the reasonable wants of his ward.

Held, that the complaint was bad on demurrer for want of sufficient facts.

APPEAL from the Gibson Common Pleas.

RAY, J.—Complaint by the appellee against the appellant for maintaining and providing for the wards of the latter.

The question is upon the sufficiency of the complaint, which is as follows:—

“Edward Cannon complains of James Gwaltney, and says that heretofore, to wit, on the — day of —, 186—, the defendant was, by the Warrick Court of Common Pleas, duly appointed guardian of the persons and estates of Lafayette Gwaltney, John H. Gwaltney, Anna Gwaltney, and Noah Gwaltney, minor heirs of Noah Gwaltney, late of Warrick county, deceased; that said defendant qualified and took upon himself the burden of said trust as such guardian.

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And plaintiff further says that said defendant, as such guardian, is indebted to the plaintiff in the sum of six hundred and seventy-nine dollars, for keeping, boarding, and clothing his said wards, and for money paid and expended for medical attendance on said wards, for three years, to wit, from the month of March, 1864, to the month of March, 1867; that said sum of six hundred and seventy-nine dollars is wholly unpaid. Wherefore, plaintiff asks judgment for the sum of six hundred and seventy-nine dollars, and other proper relief."

The defendant demurred to the complaint, for the following grounds of objection:

"1. That the complaint does not state facts sufficient to constitute a cause of action.

"2. That there is a defect of parties defendant."

The demurrer was overruled by the court, and exception was taken by the appellant at the time.

It is objected by appellant, that there is no averment that the expenditure for clothing, and medical attendance, and the boarding of the wards, was at the request of the appellant, or upon any promise made by him to pay for the same. In answer to this objection, we are referred to the forms given by the statute, numbered 10 and 11, 2 G. & H. 376. These forms upon actions for goods sold and delivered, and materials furnished to the defendant, and work and labor done for the defendant, do not require an allegation that the defendant promised to pay. But in all these instances the law implies the promise from the facts stated; and our statute simply requires the statement of facts, and if upon these facts the law implies a promise, the complaint will be good. But where the action is against one for goods sold to another, there the law does not imply a request or promise, and that averment must be made.

The case before us does not state facts which at law impose any obligation upon the guardian. There is no averment that he failed to provide, within the means in his hands as guardian, for the reasonable wants of his wards,

Cavanaugh v. The State.

and under such circumstances a volunteer cannot render himself the creditor of the guardian.

The demurrer should have been sustained to the complaint.

Judgment reversed, with costs; and the cause remanded, for further proceedings.

W. Aydelotte, for appellant.

W. M. Land, for appellee.

CAVANAUGH v. THE STATE.

PRACTICE.—*Supreme Court.*—*Assignment of Errors.*—*Criminal Law.*—In the assignment of errors on an appeal by the defendant in a criminal action, the only errors assigned were, that the finding was contrary to law and to the evidence given on the trial.

Held, that no question was properly presented for the decision of this court.

APPEAL from the Warren Circuit Court.

ELLIOTT, C. J.—Cavanaugh, the appellant, was tried and convicted on an indictment for selling intoxicating liquor to a minor, and fined five dollars and costs.

The only errors assigned are, that the finding was contrary to law and to the evidence given on the trial.

A new trial was asked for the same reasons, which was overruled; but overruling the motion for a new trial is not assigned for error, and under repeated rulings of this court, the errors assigned do not properly present any question for the decision of this court. The judgment must, therefore, be affirmed.

Judgment affirmed, with costs.

J. McCabe, for appellant.

R. B. F. Peirce and *D. E. Williamson*, Attorney General, for the State.

City of Indianapolis v. Parker, Sheriff.

CITY OF INDIANAPOLIS v. PARKER, Sheriff.

NEW TRIAL.—*Excessive Damages.*—The assignment of excessive damages as a cause in a motion for a new trial is the only method by which that question can be raised.

TIME.—*Computation of.*—*Sheriff.*—*Custody of City Prisoners.*—Where a city, having no prison in which to confine prisoners convicted before its court for violations of its ordinances, commits them to the custody of the keeper of the county prison, it seems that if a prisoner is so placed in the custody of such keeper a short time before midnight and discharged a short time after that hour, the city cannot properly be charged with two days' boarding therefor.

APPEAL from the Marion Common Pleas.

Suit by the appellee against the appellant. The complaint alleges, that the plaintiff, as the sheriff of Marion county, is the keeper of the prison of said county; that the defendant having no prison wherein to confine prisoners convicted and committed for violations of the ordinances of said city, before the judge thereof, such prisoners are committed to the custody of the plaintiff, as keeper of the prison of the county; that the defendant is indebted to him for the custody, boarding, commitment, and discharge of such prisoners during the months of June and July, 1867, in the sum of \$1,448,20, &c. Bills of particulars are attached as exhibits.

The defendant for answer filed the general denial; and it was agreed that thereunder all legal defenses might be offered, the same as if specially and properly pleaded.

The cause was submitted to the court upon the following agreed statement of facts:—

"The plaintiff is, and before the first day June, 1867, was, sheriff of Marion county, and as such had the keeping, custody, and boarding of the city prisoners committed by the city court of the defendant, during the months of June and July, 1867; that at the proper time the plaintiff presented to the city council his itemized accounts for the keeping, custody, and boarding of the city prisoners for the said months of

June and July, setting forth in separate columns the names of the prisoners, the offense for which committed, the date of commitment and of discharge, the number of days charged for, and (except where the prisoners had remained in from the former month, in which case it had been charged on the account of the preceeding month) the sum of forty cents for commitment and discharge, and the total for such prisoners, together with the total for all the prisoners; which accounts are in the words and figures following, to wit: (Copied with the complaint.) To each of these accounts was affixed a certificate of the plaintiff, sworn to before the clerk of Marion county, setting forth, that the bills were correct and just, that the articles furnished were necessary for the public service, and that the prices charged were just and reasonable. It is further agreed, that whenever a prisoner was committed to prison in the evening and discharged the following morning, the city was charged on these itemized accounts for two days; that when the prisoner was committed in the evening and discharged the next morning but one, that is, upon the second morning, the city was charged for three days; thus charging the city for one day's boarding, &c., for every calendar day any portion of which the prisoner was in custody; that if the period of twenty-four hours, and every fraction of twenty-four hours over and above full periods of twenty-four hours, had been reckoned as one day, instead of the method actually adopted in said accounts, the account for the month of June aforesaid would have charged the defendant with one hundred and fourteen days, or fifty-seven dollars, less than is therein actually charged; that said account would have been for five hundred and thirty-nine dollars and ten cents, instead of five hundred and ninety-six dollars and ten cents, the amount therein actually charged; that on the same principle, the account for July would have been for one hundred and sixty-nine days, or eighty-four dollars and fifty cents, less than actually charged; that said account for July would have been for seven hundred and sixty-seven dollars and sixty

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cents, instead of for eight hundred and fifty-two dollars and ten cents, the amount actually charged. It is agreed that in said account for July the defendant is charged for the keeping, custody, and boarding of one John Davis, committed for intoxication, for two days (or one dollar), and one commitment and one discharging fee (or forty cents); that said Davis is represented by said account as having been committed on the 28th of July and discharged on the 29th of July; that in truth and in fact, said Davis, immediately on being committed on the 28th of July, deposited with the plaintiff a sum of money sufficient to pay the ordinary judgment and costs on a plea of guilty in such case, and was thereupon immediately discharged by the plaintiff from custody, and said sum so taken was, on the morning of the 29th, sent by the plaintiff by the hands of the city marshal to the police court of the defendant, where a plea of guilty was entered by said marshal for said Davis, and said judgment and costs were paid with said sum. It is further agreed that the accounts are correct, subject to the foregoing statement and explanation thereof as to the manner in which said charges are made."

This was all the evidence given in the cause; and thereupon the court found for the plaintiff, and assessed his damages at \$1,448.20.

The appellant moved for a new trial, on the grounds, that the finding was contrary to law and contrary to the evidence. The court overruled the motion, and this is assigned for error.

RAY, J.—The only ground upon which this case could be reversed, were it presented by the record, is, that the damages assessed by the court are excessive. There can be no question that some of the charges are legal and proper, and although there seem to us to be items included in the account which cannot find any justification in law, as the charge for two days boarding where the prisoner was placed in the custody of the sheriff a short time before midnight and discharged therefrom a short time after that

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hour, still, as excessive damages were not assigned as a cause for a new trial, we cannot say that the court erred in overruling the motion. It is insisted by counsel, that the agreed statement of facts called the attention of the court below to this error in the finding, but as the statute directs the method by which the question may be raised, we can recognize no other. The authorities in our own court in support of this ruling are numerous.

Judgment affirmed, with costs.

B. K. Elliott and C. L. Holstein, for appellant.

J. Hanna and F. Knefler, for appellee.

SMITH v. HOWE and Wife.

MARRIED WOMAN.—*Separate Real Estate.*—*Contract.*—In this State a married woman can charge her real estate by such contracts only as are reasonably calculated to make the estate profitable to her, or to preserve it, or to protect her title thereto.

SAME.—A married woman who owns real estate in her own separate right and is in the habit of making contracts in her own name without the co-operation of her husband, who has abandoned her and is residing in another state, cannot charge such real estate by her written agreement to pay a certain sum to a third person if he will tell her the whereabouts of her husband so that she can find him.

APPEAL from the Marion Common Pleas.

FRAZER, J.—This was a suit against a *feme covert*, upon the following contract, executed by her during coverture:

“Indianapolis, Ind., July 22, 1868.

“I hereby agree to pay H. H. Smith fifty dollars if he tell me where William Henry Howe is at this time, so I can find him; \$25 down, and \$25 in the course of two months from this date. (Signed.) **MRS. M. HOWE.**”

It was alleged by the complaint, that William Henry Howe was the husband of Mrs. Howe, had abandoned her, and

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was then residing in Missouri; that the plaintiff fully performed the condition mentioned in the contract; that she was in the habit of making contracts in her own name, without the co-operation of her husband; that she owns in her own separate right certain real estate in Indianapolis, which is described; and that the agreement was made upon the faith and credit of her said separate property.

It is assigned for error, that the court below sustained a demurrer to the complaint.

In *Kantrowitz v. Prather*, at this term (*ante*, p. 92), after the most careful consideration, we held, that our statute giving a married woman her own lands and the profits thereof as fully as if she were unmarried, and at the same time restraining her from incumbering or conveying such lands except by deed in which her husband shall join (1 G. & H. 374, sec. 5), must be regarded as having much the same effect that a like provision would formerly have wrought in a deed of settlement; that to allow her to charge her real estate by her own contracts generally, would be to render the restraint which the statute has imposed upon her of no effect, because she might by indirection accomplish the very thing that the statute was intended to prevent; and that she can therefore charge her real estate by such contracts only as are reasonably calculated to make the estate profitable to her, or to preserve it, or to protect her title thereto. So much power seems necessary to accomplish the purpose of the statute, by making available the rights which the legislature, with a purpose to remedy the old law and favor married women, plainly gave. More than that cannot be justified by any sound principle of statutory construction.

The contract in suit in this case is clearly not of such a character, and we must therefore regard the action of the court below upon the demurrer as entirely correct.

Judgment affirmed, with costs.

D. V. Burns and *V. Carter*, for appellant.

G. T. Morton, for appellees.

McSHEELY v. BENTLEY.

NEW TRIAL.—*As of Right*.—There is no error in overruling a motion for a new trial as of right in an action of ejectment, where no proof is presented to the court that the costs have been paid.

APPEAL from the Lake Circuit Court.

RAY, J.—This was an action of ejectment by the appellee against the appellant. Trial, and finding and judgment for the plaintiff below. A motion for a new trial was presented as follows:

“Comes now the defendant, and shows to the court that he has paid all the costs herein, and now moves that the court vacate the judgment herein and grant a new trial of this cause, as a matter of right.”

There were also reasons assigned for a new trial, but they are not presented in this court.

The motion was overruled. We cannot say that there was error. The recital in the motion, that the costs were paid, is no evidence of the fact. Proof of their payment presented to the court below, we must presume, would have secured all the relief to which the defendant was entitled.

Judgment affirmed, with costs.

D. P. Baldwin and *G. T. Wickersham*, for appellant.

S. E. Perkins, *L. Jordan*, and *S. E. Perkins, Jr.*, for appellee.

McCOWAN and Others v. WHITESIDES.

INJUNCTION.—*Nuisance*.—*Obstructing Highway*.—A private person cannot enjoin the obstructing of a public highway without showing a special and pe-

31b	235
131	233
131	378
31b	235
141	613
31b	235
145	84
31(b)	235
154	555
154	556
154	560
156	240
31	235
Case 2	
180	232
31	235
Case 2	

McCowan and Others v. Whitesides.

cular injury to himself, not common to the public. The fact that the injury to such person is greater in degree than that to others does not entitle him to such relief. The injury may be to more than one person, but must not embrace the entire public.

SAME.—In a complaint to enjoin the obstructing of a public highway, the only averments connecting the plaintiffs with the highway were, "that it is their usual, convenient, and necessary route of travel from their houses, which are all on, or in the vicinity of, the road, to their market town and usual place of business; and that without greater or less circuitry, when the road is so obstructed, they and each of them have no other means, nor have the public wishing to use the road, of going to and fro, as they have a right to do, for business, comfort, and pleasure."

Held, that the complaint was bad on demurrer.

APPEAL from the Wabash Circuit Court.

GREGORY, J.—The court below sustained a demurrer to the complaint, and rendered final judgment against the appellants.

The complaint was for an injunction against Whitesides, to enjoin him from obstructing a highway.

The obstruction complained of was the building of a fence across the road. The complaint shows no impending damage special to the appellants.

The only averments in any way connecting the plaintiffs with the highway are, "that it is their usual, convenient, and necessary route of travel from their houses, which are all on, or in the vicinity of, the road, to Wabash, their market town and usual place of business; and that without greater or less circuitry, when the road is so obstructed, they and each of them have no other means, nor have the public wishing to use the road, of going to and fro, as they have a right to do, for business, comfort, and pleasure."

The question in the case is, can a private person enjoin the obstructing of a public highway without showing a special injury to himself, not common to the public?

It is claimed, that the appellants have a property interest in the road, which a court of equity is bound to protect against the wrong-doer.

The appellants have no legal right that can be enforced at law. *Willard v. City of Cambridge*, 3 Allen, 574. Nor can

McCowan and Others v. Whitesides.

a bill in equity for the abatement of the nuisance be maintained. *Hartshorn v. Inhabitants of South Reading*, 3 Allen, 501; *Brainard v. Connecticut River R. R.*, 7 Cush. 506; *Harvard College v. Stearns*, 15 Gray, 1.

The rule is well stated in the latter case, thus: "that for an injury common to all, arising from a public nuisance, the remedy is by an indictment or public prosecution. But if an individual suffers a peculiar and special damage not common to the public, he may have his private action."

The difficulty in this class of cases arises from the fact that the line of discrimination between the cases where a private action for such obstruction does or does not lie is not very clearly or satisfactorily established.

In the case at bar, if the bill had been filed by some one whose lands bordered on the road, and facts had been averred showing an injury to the lands of the plaintiff, by reason of the nuisance, then undoubtedly a remedy would have been afforded. It is averred, that the houses of the plaintiffs are all on, or in the vicinity of, the road. Under this allegation they may all be in the vicinity, and not on the road.

The fact that the injury to the appellants is greater in degree than that to others, does not entitle them to the relief sought; the injury must be special and peculiar. It may be to more than one, but must not embrace the entire public.

The court committed no error in sustaining a demurrer to the complaint.

Judgment affirmed, with costs.

J. U. Pettit and *W. G. Sayre*, for appellants.

W. March, for appellee.

Caldwell v. Kenworthy and Another.

CALDWELL v. KENWORTHY and Another.

PLEADING.—*Justification.*—*Officer.*—An answer justifying an arrest made by the defendant as sheriff, by virtue of a *capias ad respondendum* issued from the office of the clerk of the court of common pleas, need not state that an affidavit was filed before the writ issued; but if the return day be past, the answer must show a return.

APPEAL from the Boone Circuit Court.

RAY, J.—Suit by the appellant against the appellees for assault and battery and false imprisonment.

The only question presented in this court is upon the action of the circuit court in overruling a demurrer to the special answer of Kenworthy, who justified as to the arrest of appellant, as sheriff, by virtue of a *capias ad respondendum* issued from the office of the clerk of the Court of Common Pleas of Boone county, and alleging, that in making said arrest under said writ he did nothing more than is usual and lawful to do in the service of such process, and denying the assault, &c. A copy of the writ is set forth, but contains no copy of a return, although the return day was past. It is urged, that the answer is defective in not stating that an affidavit had been filed before the writ issued; but it was held, in *Davis v. Bush*, 4 Blackf. 330, that where the writ recites a cause of action within the jurisdiction of the court, the officer is not bound to look beyond it and inquire whether it was preceded by an affidavit or not. Its precept is obligatory upon him and must constitute his defense, provided his duty has been discharged. It was held, however, that the officer must allege his return in the plea, the return day being past. Without it, his justification is not complete, and he is a trespasser *ab initio*.

The answer was defective in not making this averment, and the writ as set out showing no return, the demurrer should have been sustained.

Judgment reversed, and cause remanded, with direction

Epply v. Mowrer.

to sustain the demurrer to the second paragraph of the answer of Kenworthy. Costs here.

M. M. Ray, J. W. Gordon, and W. March, for appellant.

C. S. Wesner, for appellees.

EPPLY v. MOWRER.

APPEAL from the Decatur Common Pleas.

RAY, J.—The appellant brought suit upon a judgment rendered in the Decatur Circuit Court on the 24th day of April, 1855. An answer was filed which alleged, that the plaintiff in the judgment had, under proceedings supplementary to execution, obtained an order that the defendant therein should deliver to him a certain note for one hundred dollars, "which said note the said plaintiff is to receipt for, collect, and credit on his judgment." No averment is made that the note had been collected, but a credit is demanded for one hundred dollars.

A demurrer to this answer was sustained to the complaint.

The judgment is reversed, and the demurrer directed to be sustained to the answer. Costs for appellant.

C. Ewing and J. K. Ewing, for appellant.

J. S. Scobey and E. R. Monfort, for appellee.

BARR v. BARR.

DIVORCE.—Interrogatories.—Evidence.—Interrogatories to be answered under oath by the defendant cannot properly be filed with the answer to a cross petition in an action for a divorce; and if filed and answered, the answers cannot properly be introduced in evidence.

APPEAL from the Carrol Common Pleas.

RAY, J.—The appellee, Pamela Barr, filed her petition for a divorce, on the grounds, that the appellant had abandoned her more than one year before the bringing of her action; that he had failed to provide for her maintenance; that he had used her in a cruel manner, by calling her foul names, and had permitted his grown children by a former wife to abuse her; that appellant was worth twenty-five thousand dollars; and asking alimony. Answer in denial, and a cross petition charging, that the appellee had abandoned the appellant without cause; that she had a violent and uncontrollable temper, and abused his children, and quarreled with the inmates of his house.

The appellee answered the cross petition by a denial, and filed interrogatories to the appellant as to the value of the property owned by him, which were answered.

On the trial, the appellee offered these answers in evidence, and, over the objection of the appellant, they were received; and a finding in favor of the appellant was had, and a decree of divorce on his cross petition was rendered, with an allowance of fifteen hundred dollars to the appellee as alimony, from which allowance this appeal is taken.

The statute regulating proceedings in divorce provides, that "the defendant shall answer said petition under oath, if required so to do by the petitioner." 2 G. & H. 352, sec. 13.

The interrogatories in this case were filed with the answer to the cross petition, and are not authorized by the statute; and therefore the answers were not proper evidence upon which to rest the decree for alimony.

Heavilon and Another v. Kramer.

The decree for alimony is reversed, and the cause remanded, for further proceedings in that matter. Costs for appellant.

GREGORY, J., dissented.

L. B. Sims, J. H. Stewart, J. Applegate, R. H. Milroy, and J. H. Gould, for appellant.

B. B. Daily and D. B. Graham, for appellee.

HEAVILON and Another v. KRAMER.

CONTRACT.—Breach of.—Measure of Damages.—Where a person contracts to do a certain amount of work, at a stipulated price, upon materials to be furnished by his employer within a specified time, and is ready and willing to perform, but is prevented by the failure of the employer to furnish materials as promised, he is entitled to merely compensatory damages; and where during such time he is offered other employment of the same kind, he is not entitled to the whole amount of profits he would have made if the contract had been fully performed by both parties.

APPEAL from the Clinton Common Pleas.

Suit by the appellee against Taylor Heavilon and Joseph Heavilon, the appellants. The complaint is in two paragraphs.

The first paragraph alleges, that on the 10th day of December, 1864, the plaintiff was the owner of a portable steam-saw-mill, and was engaged in the business of sawing lumber; that at that date he entered into a contract with the defendants whereby it was agreed that, in consideration that he would remove his mill to their farm in the county of Boone and saw for them, they would furnish to said mill one thousand logs of ordinary size and dimensions for making lumber; that they would furnish and deliver said logs at said mill on said farm in the summer and fall of 1865; that they would pay him sixty cents per one hundred feet.

Heavilon and Another v. Kramer.

for such sawing; that the cost to the plaintiff of sawing said one thousand logs would have been only twenty cents per one hundred feet, and there would have been 425,000 feet of lumber; that the plaintiff complied in all things with the terms and stipulations of said contract, on his part; but that the defendants wholly disregarded the same, failed and refused to furnish the said one thousand logs, and only furnished of them one hundred and seventy-six logs; that he is damaged in the sum of thirteen hundred dollars; that in furtherance of said contract he removed his mill to said farm and sawed all the logs furnished by the defendants, and was ready and willing to saw all the logs specified in said contract, had the defendants complied, &c., which they failed to do; and that the plaintiff was ready and willing to saw said logs during the summer and fall of said year.

The second paragraph is a common count, averring, that the defendants are indebted to the plaintiff in the sum of \$509.71, for work and labor done at their request; and a bill of particulars for lumber sawed in September, 1865, amounting to that sum, is filed with this paragraph.

A demurrer to the first paragraph, assigning want of sufficient facts therein, was overruled, and the defendants excepted.

The defendants for answer filed the general denial and several special paragraphs. The second paragraph avers, that at the time of making the contract mentioned in the first paragraph of the complaint, the lower and main saw of the plaintiff's mill was greatly out of repair and damaged by having several teeth broken out and being kinked, in consequence of which it was impossible to saw with it good and merchantable lumber, which being at the time known to the parties, it was distinctly agreed, as a part of the contract, and as a part of the inducements to the defendants to enter into the same, that the plaintiff before locating his mill on said premises of defendants and proceeding to saw their lumber would furnish a new and good saw, such as would do good and merchantable work, and he

would saw for them good and merchantable lumber; that it was further agreed that the plaintiff would not locate his mill on their farm or require them to furnish any logs till after harvest and seeding time in the following year of 1865; that he would then furnish for the use of the defendants in supplying said mill with logs and hauling off lumber, and for the use of the mill-yard generally, two yoke of oxen and a log-wagon; that the plaintiff wholly failed to furnish the saw stipulated for, or any other except the old and damaged one; that he failed to make good and merchantable lumber; that he failed to furnish said wagon and team as stipulated, or any other force in lieu thereof; that he located his mill on their premises on the 22d of June, 1865, which was before harvest, and ceased to saw or do any work there on the 2d of September of that year, all of which was before seeding time was over.

Upon the other paragraphs of the answer no question arises here.

The plaintiff replied by the general denial. The cause was tried by a jury, and a verdict for the plaintiff for \$1,361.18 was returned, upon which judgment was rendered over the defendants' motion for a new trial.

The second instruction to the jury was as follows:—

“If the jury believe from the evidence that the parties entered into the contract set out in the complaint; and that the plaintiff in pursuance thereof erected his mill on the farm designated in the agreement, within the time specified; and that the defendants, in part performance of their contract furnished and delivered at the mill one hundred and seventy-six of the logs, which were sawed by the plaintiff; and that he had and kept his mill in order, and was ready and willing to receive and saw the balance of the logs; and that they failed to furnish any more of the logs; then the plaintiff is entitled to recover the amount of the profits he has proven, if any, he would have made on the sawing of the unfurnished logs if they had been furnished by the defendants.”

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To the giving of this instruction the defendants excepted.

The court refused to give the following instructions asked by the defendants:

"3. If the plaintiff has a right to recover for a breach of the contract charged, he can only recover so much damages as is necessary to place him in as good a condition as if the contract had not been broken."

"4. If the preponderance of the evidence shows that Joseph Heavilon was not the partner of his father at the time the contract, if any, was made, and not until the plaintiff had nearly completed the sawing done at the defendants' yard, then the jury must find a verdict in favor of Joseph Heavilon, and disregard all the statements made by him to the plaintiff's witnesses prior to the time he became the partner of his father."

"6. If the preponderance of the evidence shows that the plaintiff agreed to furnish a new saw, a log-wagon, and two yoke of oxen, or either of these articles, as charged by the defendants, and failed to do so, or failed to furnish saw, oxen, or wagon, he cannot recover for a breach of said contract."

"7. If the plaintiff failed to saw merchantable lumber for defendants, such failure excused them from the completion of the contract, and the plaintiff cannot recover for a breach thereof."

FRAZER, J.—It is argued that there was error below in overruling a demurrer to the first paragraph of the complaint, but we are not of that opinion.

The other question before us is upon the motion for a new trial, which was overruled. We think it should have been sustained, on account of erroneous instructions having been given to the jury, and for refusing instructions asked.

The appellee was the owner and operator of a portable steam-saw-mill and claimed that the defendants had contracted with him to remove his mill to their land and saw at a certain price one thousand logs for them, to be furnished

Anderson v. Meeker.

by them during the summer and fall of 1865; that they failed to deliver the logs, whereby he was damaged, &c. The general denial was pleaded.

As to the measure of damages, the court told the jury, that if the plaintiff had made out his case, he was "entitled to recover the amount of profits he has proven he would have made on the sawing of the unfurnished logs if they had been furnished."

This is not, we think, the rule of damages which the law provides in such cases; there being evidence that he need not have allowed his mill to remain idle, other employment having been offered. It would give more than compensatory damages, and the case was not of a nature to warrant this. So the jury were afterwards told in another instruction.

The court erred also in refusing the third, fourth, sixth, and seventh instructions asked by the appellants.

Judgment reversed, with costs; and cause remanded for a new trial.

J. N. Sims, H. Y. Morrison, and T. H. Palmer, for appellants.

J. Claybaugh and L. McClurg, for appellee.

ANDERSON v. MEEKER.

PLEADING.—Consideration.—Suit on a note against the maker. Answer, that the defendant received no consideration for the note.

Held, that the answer was bad on demurrer.

APPEAL from the Fountain Common Pleas.

RAY, J.—Suit on note against the appellant. A paragraph of answer was filed, which alleged, "that defendant received no consideration for said note." A demurrer was

Schliet v. The State.

sustained to this paragraph, and the ruling thereon presents the only question for our consideration.

The issue tendered by the paragraph was personal. If the note, which was executed by appellant, had a consideration to support it, that was sufficient, whether received by the appellant or some one else with his consent.

The judgment is affirmed, with costs.

M. M. Milford, for appellant.

J. Buchanan, for appellee.

SCHLICT v. THE STATE.

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LIQUOR LAW.—*Sunday.*—Section 8 of the act to regulate the license and sale of intoxicating liquors, &c., (1 G. & H. 616) as amended in 1865 (Spec. Sess. 197), prohibits the sale on Sunday of any quantity of intoxicating liquor by a licensed retailer, and is not in conflict with the Constitution of the State.

SAME.—*Evidence.*—On the trial of an information under this section, charging, that the defendant was licensed under said act to sell intoxicating liquors in a less quantity than a quart at a time, it appeared in evidence that the defendant, at the time of the sale charged (the fall of 1867), was engaged in the sale of intoxicating liquors by the "small;" and there were given in evidence two orders of the board of county commissioners, one made at the December term, 1866, and the other at the December term, 1867, granting license to the defendant to sell intoxicating liquors by retail.

Held, that this evidence did not show that the defendant was licensed, and was not sufficient to justify a finding against him.

APPEAL from the Ripley Common Pleas.

ELLIOTT, C. J.—Schliet, the appellant, was tried on an information for selling intoxicating liquors on Sunday, found guilty, and fined forty dollars and costs.

The information was based on the 8th section of the act to license and regulate the sale of intoxicating liquors, &c., as amended in 1865 (Acts Spec. Sess. p. 197), and alleged, that the appellant was licensed under said act "to sell intox-

icating liquors in a less quantity than a quart at a time."

A motion for a new trial was made, urging several reasons therefor, one of which was, that the finding of the court was contrary to the evidence. The motion was overruled, and that ruling assigned for error.

The evidence is before us, and the first objection urged to its sufficiency is, that it does not show that the quantity of liquor sold was less than a quart at a time. The objection is not well taken; the statute prohibits the sale, by licensed retailers, of any quantity of intoxicating liquor on Sunday.

It is also insisted, that the evidence does not show that the appellant was licensed to retail intoxicating liquors, at the time of the sale charged in the information.

The prosecuting witness testified, that at the time of the sale charged in the information, being in the fall of 1867, the appellant "was engaged in the sale of intoxicating liquors by the small." The attorney for the State also gave in evidence two orders of the board of county commissioners of Ripley county, one made at the December term, 1866, and the other at the December term, 1867, granting license to the appellant to sell intoxicating liquors by retail. This was all the evidence tending to prove that the appellant was licensed. We think it was not sufficient to justify the finding. After the grant of license by the board of commissioners, the statute requires the applicant to execute a bond in the sum of five hundred dollars and pay to the county treasurer the sum of fifty dollars, and provides that upon the execution of the bond "and the presentation of the order of the board of commissioners granting him license, and the county treasurer's receipt for the fees, as aforesaid, the county auditor shall issue a license to the applicant," &c. It is the license so issued, and not the order of the board granting a license, that authorizes the applicant to sell by retail. A license may be authorized by the board and yet not be taken out; and hence the order of such grant does not, of itself, prove that a license was issued.

Green v. Ayers.

The court therefore erred in overruling the motion for a new trial.

The objections urged to the validity of the statute under which the prosecution was had, as being in conflict with the Constitution of the State, are without foundation.

For the error stated above, the judgment is reversed, and the cause remanded for a new trial.

E. P. Ferris, for appellant.

H. M. Spalding and *D. E. Williamson*, Attorney General, for the State.

GREEN v. AYERS.

APPEAL.—Vacation of Highway.—Where, in a proceeding to vacate a highway on the ground that the same is not of public utility, viewers are appointed who report in favor of the petition on the ground stated therein, and, upon objection being made to the vacation, other viewers are appointed, who report against the public utility of the vacation, no appeal lies to the circuit court from the decision of the board of county commissioners overruling a motion, made by one of the petitioners, to set aside the appointment of such other viewers.

APPEAL from the Hendricks Circuit Court.

RAY, J.—Appellant and others filed their petition before the board of commissioners for the county of Hendricks, to have a certain highway vacated, on the ground that the same was not of public utility. Viewers were appointed, who reported in favor of the petition upon the ground stated. The appellee objected to the vacation of the road, and other viewers were thereupon appointed, who reported that it would not be a matter of public utility to have the highway declared vacant. Thereupon the appellant moved the court to set aside the appointment of the last set of

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viewers, and, upon the overruling of his motion, appealed to the circuit court, where his appeal was dismissed.

This ruling was correct. There was no decision of the board of county commissioners which in any way determined the petition of the appellant. What they would have decided, we cannot anticipate.

The judgment of the circuit court in dismissing the appeal is affirmed, with costs.

C. C. Nave, for appellant.

C. Foley and *L. M. Campbell*, for appellee.

HUBBLE v. OSBORN.

EVIDENCE.—*Number of Witnesses.*—A party cannot lawfully be limited by the court to one witness upon a vital point in issue.

SAME.—*Resulting Trust.*—Suit by A. against B. and C. for possession of certain real estate purchased by the plaintiff at sheriff's sale on an execution in favor of the plaintiff issued upon a judgment against B., the legal title at the time of such sale standing in the name of C., to whom it had been conveyed by D. The plaintiff claimed, that B. had paid the purchase-money, and, to defraud his creditors, particularly the plaintiff, to whom he was then largely indebted, procured the conveyance to be made by D. to C. It was claimed in defense, that in making the purchase B. acted as the authorized agent of C., who was not present, and that B. advanced the purchase-money in pursuance of an agreement with C. by which he was to so advance it as a short loan to C., who soon afterwards repaid the money. On the trial, B. testified to this effect, and C. testified to the same facts, except as to the fact of the loan, concerning which the court refused to allow him to testify.

Held, that this refusal was error.

RESULTING TRUST.—*Fraud.*—*Presumption.*—In such suit the court instructed the jury, that if B. was indebted to plaintiff in a large sum at the date of the deed from D. to C., and B. contracted for and paid for said land out of his own moneys, and had the same conveyed by deed to C., "such conveyance is presumed fraudulent as against the plaintiff, and a trust results in

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favor of the plaintiff to the extent of his just demand, unless the fraudulent intent is disproved by the evidence before you."

Held, that the instruction was correct.

SAME.—Evidence.—Admissions.—The admissions and declarations of the person paying the purchase money, made after the conveyance to the other person, are not admissible in evidence against the latter.

PRACTICE.—Motion for New Trial.—Filing of Affidavits.—Motion for a new trial on the ground of misconduct of the jury. Affidavits in support, though ready, the party making the motion refused to put on file or submit to the inspection of the opposing counsel before the motion was taken up for argument, though he was previously notified in open court that objection would be made to the reading of them unless they were so filed. The court refused, therefore, to allow them to be read.

Held, that in this there was no error.

APPEAL from the Greene Circuit Court.

FRAZER, J.—This was a suit to recover the possession of a tract of land. The plaintiff claimed title by virtue of a purchase at sheriff's sale upon an execution in her favor issued upon a judgment against Samuel Hubble, recovered in the Common Pleas Court of Greene county. At the time of the sheriff's sale, the legal title stood in the name of the appellant, Daniel Hubble, to whom it had been conveyed by one Dayhoff, who was previously seized in fee simple, and it was claimed that Samuel (who was also a defendant) had paid the purchase-money and, to defraud his creditors, particularly the plaintiff, to whom he was then largely indebted, procured the conveyance to be made to the appellant, Daniel. This point constituted the chief matter of controversy. There was a verdict and judgment for the plaintiff, a motion for a new trial having been overruled, and Daniel appeals. Every question presented for our consideration arises upon the error assigned, that the court below erred in overruling the motion for a new trial.

It was shown by evidence that Samuel Hubble negotiated the purchase of the land and paid the purchase-money, Daniel not being present, and that he directed that the conveyance be made to Daniel.

The theory of the defense was, that in making the purchase Samuel acted merely as the authorized agent of Dan-

iel, the sickness of whose wife prevented him from leaving home; and that though Samuel did, in fact, advance the purchase-money, it was done in pursuance of an agreement between him and Daniel by which he was to do so as a short loan to Daniel, to be repaid, and that the money was accordingly soon after repaid to him by Daniel. This agreement the defendant offered to prove by the testimony of both Samuel and Daniel, but the court rejected the evidence, as appears by a special bill of exceptions; and this was one of the causes assigned for a new trial. It appears, however, by a subsequent bill of exceptions containing the evidence, that Samuel did, nevertheless, testify to that effect, and that Daniel also testified to the same facts except only the fact of the loan of the purchase-money by Samuel to him. Reconciling the two bills of exceptions as far as can be, we must conclude that after rejecting the evidence at first, the court afterwards permitted all the facts to be proved by one of the witnesses, and some of them by the other.

The evidence was all material, and went to the very heart of the controversy. We can perceive no good reason for rejecting any part of it, and certainly none for confining the appellant to one witness in proving the fact of the loan. If that fact existed the appellant should have had the verdict. It was therefore important to him to establish it by the greatest possible weight of testimony. The court could not lawfully limit him to one witness upon the vital point. This error must reverse the judgment.

The court instructed the jury as follows: "If the jury believe from the evidence that the defendant Samuel Hubble was indebted to the plaintiff in a large sum at the date of the deed from Dayhoff to Daniel Hubble, and that said Samuel contracted for and paid for said land out of his own moneys and had the same conveyed by deed to Daniel, said conveyance is presumed fraudulent as against said (plaintiff) creditor, and a trust results in favor of such prior creditor to the extent of her just demand, unless the fraudulent intent is disproved by the evidence before you."

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It is claimed that this instruction was erroneous. We are not of that opinion. The act concerning trusts and powers (1 G. & H. 651, secs. 6, 7) and the code (sec. 526) seem conclusively to support the instruction. *Tevis v. Doe*, 3 Ind. 129, is an instructive case upon the subject.

The admissions and declarations of Samuel made after the conveyance to Daniel were admitted as evidence against Daniel, notwithstanding the objections of the latter. This was improper. Assuming there was, at the time, evidence adduced sufficient to show, *prima facie*, a conspiracy between Samuel and Daniel to defraud the plaintiff, that would only bind each by such declarations of the other as constituted a part of the *res gestæ*, and would not make subsequent statements of the nature of the transaction evidence against anybody but the person making them. 1 Greenl. Ev. § 111.

One cause assigned for a new trial was misconduct of the jury. Affidavits in support, though ready, the appellant refused to put on file or submit to the inspection of the appellee's counsel before the motion was taken up for argument, though he was previously notified in open court that objection would be made to reading them unless they were previously filed. The court refused, therefore, to allow them to be read upon the hearing of the motion. We would not, under such circumstances, say that there was error in this.

Judgment reversed, with costs, and the cause remanded for a new trial.

S. Claypool, for appellant.

J. M. Hanna, for appellee.

STEWART v. HUTCHINS.

PLEADING.—*Justice of the Peace*.—The strict rules of pleading are not applicable to proceedings before a justice of the peace.

Stewart v. Hutchins.

SAME.—Warranty.—Demand of Judgment.—Suit before a justice of the peace on a note for \$125. Answer, waiving the statutory denial and averring, that the note was given in part payment for a mare sold by plaintiff to defendant; that at the time of the sale plaintiff represented and warranted the mare as sound, when, in truth, she was unsound to such an extent that she died in consequence thereof in a short time; that plaintiff well knew she was unsound, and, designing to cheat and defraud defendant, warranted her to be sound; that defendant, relying on the representations and warranty of plaintiff, purchased her of plaintiff, and, as part payment, gave the note in suit, and for no other consideration whatever; that, in addition to the note, defendant paid plaintiff \$40 in money for the mare, and was at great expense in keeping and caring for her, whereby he was damaged \$25; and he claimed judgment for \$75, and all other proper relief.

Held, on motion by plaintiff for judgment notwithstanding a verdict for defendant, that the answer covered the note in suit and demanded judgment for \$75 over and above the same.

APPEAL from the Steuben Common Pleas.

GREGORY, J.—Suit, commenced before a justice of the peace, by the appellant against the appellee on a promissory note for \$125.

The answer before the justice waived the statutory general denial, and set up, that the note was given for a part of the consideration of the purchase of a mare sold by the plaintiff to the defendant; that at the time of the sale the plaintiff represented and warranted the mare to be sound, when in truth she was unsound to such an extent that she died in consequence thereof in a short time; that the plaintiff well knew that the mare was unsound, and, designing to cheat and defraud the defendant, warranted her to be sound; that the defendant, relying on the representations and warranty of the plaintiff, purchased the mare of the plaintiff, and, as part payment therefor, gave the note in suit, and for no other consideration whatever; that, in addition to the note, the defendant paid the plaintiff forty dollars in money for the mare, and was at great expense in keeping and caring for her, whereby he was damaged twenty-five dollars; and he claimed judgment of seventy-five dollars, and all other proper relief.

The defendant also claimed a set-off for the forty dollars paid on the mare.

Stewart v. Hutchins.

Trial by jury; finding for the defendant six dollars. The plaintiff moved for a new trial. Pending the motion, the plaintiff moved the court for judgment *non obstante veredicto*, which motion the court overruled, and afterwards overruled the motion for a new trial.

It is urged, that seventy-five dollars is the entire damage claimed for the breach of the warranty, and the note being for \$125, the plaintiff was entitled to judgment on the pleadings for the difference.

The majority of this court think this would be too strict a construction of a pleading before a justice of the peace. The answer claims judgment for seventy-five dollars. The plain meaning of this is, that the defendant wanted a judgment for the forty dollars he had paid on the mare, and twenty-five dollars for the expense of keeping and the trouble in taking care of her, over and above the note he had executed for the balance of the purchase-money. It is true, there is no direct averment that the mare was of no value, but there are equivalent averments. The mare was unsound, of which unsoundness she died in a short time; and she was a great expense to the defendant in keeping and caring for her. These averments are inconsistent with the idea that she was of value. The answer was to the whole action. The pleader evidently intended to cover the note in the answer. The strict rules of pleading are not applicable to proceedings before a justice of the peace.

The court committed no error in overruling the motions.

The judgment is affirmed, with costs.

D. E. Palmer, for appellant.

J. A. Woodhall and *W. G. Croxton*, for appellee.

BROOKOVER v. FORST.

APPEAL from the Huntington Circuit Court.

RAY, J.—This was a petition for the laying out of a highway. The petition was granted and damages allowed to the appellant. An appeal was taken by him to the circuit court, and there his appeal was dismissed. He appeals from that order of dismissal to this court, and makes only one of the petitioners below a party, and process is issued and served, and error is assigned, against him alone, with the addition of "*et al.*"

It is required by a rule in this court that the names of the parties shall be stated in full in the assignment of error, and in this case it very clearly appears that we could render no judgment which could be of any avail to the appellant. A reversal of the judgment as to one petitioner would authorize no judgment on the merits.

The appeal is dismissed, with costs.

J. U. Pettit, for appellant.

J. R. Coffroth, for appellee.

RAWLINGS v. FULLER.

PARTIES.—*Plaintiff*.—*Agent*.—One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under the code, sue on such contract in his own name. (Code, secs. 3, 4.)

APPEAL from the Clark Common Pleas.

This was a suit by Benjamin P. Fuller against the appellant, Mary E. Rawlings.

The complaint contained two paragraphs. The first par-

31b	255
143	620
31b	255
148	115
150	345
31	255
Case 2	
180	584
31	255
Case 2	
188	650

Rawlings v. Fuller.

agraph is for the recovery of real estate, and damages for use and occupation, based on a written contract, which is made a part of the paragraph, and is as follows:—

“Articles of agreement between Benj. P. Fuller, and M. Rawlings. I, Benj. P. Fuller, agent for Sarah Floyd’s heirs’ property, to wit, of a brick house standing on ten feet off east side of lot No. 9, and on thirty-one feet off west side of lot No. 10, in the city of Jeffersonville, in Clark county, Indiana, do agree to rent said house and parts of lots to M. Rawlings, for the sum of sixteen and sixty-six and two-thirds, payable on the first day of every month, commencing on the 6th day of May, 1864; and the failure on the part of M. Rawlings to pay sixteen dollars and sixty-six and two-thirds cents on the first day of every month in advance, then it is hereby agreed between Benjamin P. Fuller, landlord, and M. Rawlings, tenant, that the above contract is at an end between said parties, and Benj. P. Fuller shall be entitled to take possession of said property, whenever demanded. May 12th, 1864.”

It is averred in this paragraph, that on the 6th day of November, 1867, the rent of the three preceding months was past due, and the rent of the succeeding month became due, making together the sum of sixty-six dollars and sixty-six and two-thirds cents, whereof the defendant had notice, but failed to pay the same, or any part thereof; that on the 15th day of November, 1867, the plaintiff served written notice on the defendant to quit the possession of said premises at the expiration of ten days after the service of said notice, unless the rent so due and in arrears should be paid; that the defendant refused to pay the rent, or quit the possession of the property. Prayer for judgment for the possession of the property, and for one hundred dollars in damages.

The second paragraph is for the recovery of one hundred dollars for the rent of the same property and under the same agreement, copied above.

A demurrer was filed to the complaint for a defect of

parties plaintiffs; and to each paragraph thereof, for the want of sufficient facts to constitute a cause of action.

The demurrers were overruled, and the rulings excepted to.

The appellant then filed an answer in two paragraphs; the first being the general denial. A demurrer was sustained to the second. Trial by the court, resulting in a finding on the first paragraph of the complaint, that the plaintiff was entitled to recover the possession of the premises described in the complaint, and for thirty-nine dollars and forty-three cents damages; and on the second paragraph there was a finding for the plaintiff in the sum of seventy-seven dollars and twenty cents.

The court overruled a motion for a new trial, interposed by the appellant, and rendered judgment on the finding.

ELLIOTT, C. J.—The material question in the case arises on the ruling of the court below in overruling the demurrers to the complaint.

The objection urged to the complaint by the appellant is, that it does not show a right of action in Fuller.

The third section of the code declares, that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." The provision of the next section is as follows: "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

It will be observed, in this case, that neither paragraph of the complaint sets up or asserts any claim of title whatever in Fuller to the property. The contract, which is made a part of the complaint, is signed by the appellant only, and not by Fuller, and does not, in terms, contain a prom-

Fowler v. Rice.

ise to pay the rent to him, though such a promise may, perhaps, be inferred from its language; but it declares, that on failure to pay the rent as stipulated, he shall be entitled to take possession of the property, on demand.

It describes him as the agent of the property, and expressly states that it belongs to the heirs of Sarah Floyd. We do not think the facts stated constitute Fuller the trustee of an express trust, within the meaning of the fourth section of the code; they only show, at most, that he was the agent of the owners, with authority to rent the property for them. They are the only parties in interest, and the action should have been prosecuted in their names. It does not appear, either by the agreement or the complaint, that Fuller had any personal interest whatever in the contract.

One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under the code, sue on such contract in his own name. See *Minturn v. Main*, 3 Seld. 220; *Grinnell v. Schmidt*, 2 Sandf. 706.

Judgment reversed, with costs, and the cause remanded, with directions to the court below to sustain the demurrer to the complaint.

J. G. Howard, J. F. Read, and J. W. Ray, for appellant.
G. V. Hawk, for appellee.

FOWLER v. RICE.

HUSBAND AND WIFE.—Wife's Separate Property.—Agency of Husband.—A man loaned money belonging to his wife, taking notes therefor in his own name, but declaring at the time, that it was his wife's money, and afterwards kept the notes distinct from those received on the loan of other funds. The administrator of the husband's estate took possession of such notes as

a part of the estate, with notice of the wife's claim thereto, and collected the money thereon.

Held, that the administrator was liable to the wife for the money so collected.

APPEAL from the Monroe Common Pleas.

RAY, J.—This was a suit by appellee, charging, that appellant wrongfully took possession of divers notes belonging to the appellee and collected the money due on the same and applied it to his own use.

Answer in denial, and that the appellant took the notes as administrator of the estate of Robert Rice, deceased, who had been the husband of the appellee, and that the notes belonged to said estate. Reply in denial. Finding and judgment for appellee.

It was assigned as a cause for a new trial, that the evidence did not support the finding.

The proof was, that the decedent declared that the money he loaned to the parties giving the notes, and which was the consideration for the same, belonged to the appellee; that he kept the notes taken for this money distinct from those received on the loan of other funds; and although he took the notes payable to his own order, yet this statement, made at the time, indicates that he did not intend to make any claim to the ownership of the money, but simply acted as agent for the appellee. The proof also shows the money did in fact belong to the appellee, having been received from her father's estate, and that appellant had notice of her claim.

The judgment is affirmed, with costs.

J. E. McDonald, A. L. Roache, E. M. McDonald, and J. W. Nichol, for appellant.

Hopkins v. Carr.

HOPKINS v. CARR.

STATUTE OF FRAUDS.—*Verbal Contract.*—*Partner.*—A partnership liability may become an individual debt against one member of the firm by contract not in writing between the partners, with the consent of the creditor.

PRACTICE.—*Supreme Court.*—*Abstracts.*—The evidence, although it be made a part of the record, if not abstracted as required by rule tenth of this court, will not be examined.

APPEAL from the Newton Common Pleas.

GREGORY, J.—Suit before a justice of the peace by Carr against Hopkins. Appeal by Carr to the court below.

One item in the account filed by Hopkins as a set-off was "for board bill and feed bill of Daniel Graves and Dempsey Johnson, in the sum of \$13.00."

On the trial in the court below, the defendant offered to testify that in 1864, Carr, Johnson, Jenners, and Graves, who were partners, had a lot of cattle in his pasture; that while the cattle were on pasture Graves and Johnson boarded with him, to the amount of some seventy dollars; that this included some feed for cattle; that the item in the answer was for an unpaid balance of that charge, which the plaintiff promised to pay at a time Carr and defendant had a settlement of their accounts; that Jenners had paid the other portion of the seventy dollars. The court ruled out this evidence, on the ground that it was a verbal promise to pay the debt of another, and not binding on the promisor. The ruling out of this testimony was one of the grounds assigned in the written motion for a new trial.

This presents the only question in the case. The evidence, although a part of the record, is not abstracted as required by rule tenth of this court, and therefore is not examined by us.

The rejected testimony tended to show that it was the debt of the appellee, and not the debt of another. A partnership liability may become an individual debt against one member of the firm by contract, not in writing, between

Piggott v. Kirkpatrick.

the partners, with the consent of the creditor. The evidence ought to have been admitted.

Judgment reversed, with costs; cause remanded with direction to grant a new trial, and for further proceedings.

J. Wallace, E. L. Urmston, and B. K. Elliott, for appellant.
E. P. Hammond and T. J. Spiller, for appellee.

PIGGOTT v. KIRKPATRICK.

PRACTICE.—*Amicus Curia*.—A motion to dismiss a suit on account of alleged defects in the complaint cannot properly be made by an *amicus curia*.

APPEAL from the Montgomery Common Pleas.

RAY, J.—A motion was made by *amicus curia* to dismiss the suit on account of alleged defects in the complaint. The motion was sustained by the court, over the objection of the plaintiff. There was no appearance by the defendant.

If the facts stated are not regarded as sufficient, a demurrer by the defendant will present that question to the court; but a motion to dismiss for that cause, filed by the defendant, should be overruled, as the plaintiff has a right to amend his complaint, and is deprived of this right by a nonsuit. No such motion can properly be made by any one not a party to the suit. We therefore decide nothing in regard to the merits, but reverse the case, and direct the motion to dismiss to be stricken from the files.

Costs against appellee.

M. D. White and T. Patterson, for appellant.

S. C. Willson, L. B. Willson, and J. M. Butler, for appellee.

White v. The State.

WHITE v. THE STATE.

CRIMINAL LAW.—Continuance.—The fact that in a joint prosecution upon information a continuance is granted as to a part of the defendants is no ground for continuance as to another defendant.

SAME.—Evidence.—Alibi.—The fabrication of an *alibi*, like the wilful introduction of false and fabricated evidence in support of any other ground of defense, is a circumstance against the accused, to be weighed by the jury in connection with all the other evidence in the case; but where the evidence tending to prove an *alibi* is uncontradicted, and the witnesses are unimpeached, and the facts testified to are reasonable in themselves, the failure of the defendant to account for his whereabouts during all the time within which the offense was probably committed should not be taken as a circumstance tending to prove his guilt.

APPEAL from the Clay Common Pleas.

This was a joint prosecution against the appellant and others for an assault and battery on the body of Elizabeth Miller.

Horton, one of the defendants, filed an affidavit for the continuance of the cause as to himself and Stingle, another defendant, in consequence of the absence of certain witnesses, by whom, it was alleged, an *alibi* could be proved as to said Horton and Stingle. The appellant, White, also moved for a continuance on the same affidavit. The continuance was granted as to Horton and Stingle, but refused as to the appellant, to which he excepted. White was then put upon trial on the plea of not guilty. The jury found him guilty, and assessed his fine at seventy-five dollars. A motion for a new trial was made and overruled, and judgment rendered on the verdict.

Evidence was given on the trial tending to prove an *alibi*, on the part of the appellant, in reference to which the court instructed the jury as follows:

“The defendant in this case seeks to show that he was not present at the time the offense is charged to have been committed; or, in the language of the law, to establish an *alibi*. Before a defense of this character is conclusive, the

defendant must account for his whereabouts during all the time the offense was probably committed, and his failure to do so would be a circumstance against him, which you should consider in connection with the other evidence in the case." To this instruction an exception was taken, and the giving of it is one of the reasons urged for a new trial.

ELLIOTT, C. J.—There was no error in the refusal of the court to grant a continuance of the cause to the appellant. No affidavit was filed by him, or on his behalf, showing any reason for a continuance. There was no statement in the affidavit of Horton that the appellant was not present at the commission of the offense charged in the information. The fact that a continuance was granted as to Horton and Stingle afforded no ground for a continuance as to the appellant. He was properly tried separately, after the cause was continued as to the others.

Overruling the motion for a new trial is assigned for error. Under this assignment it is insisted that the court erred in instructing the jury, that as the defendant had attempted to prove an *alibi*, his failure to account for his whereabouts during all the time of the probable commission of the offense would be a circumstance which the jury should consider against him.

In such a case, if it should be made to appear that the defense was false and feigned, and attempted to be established by false or fabricated evidence, as by the subornation of witnesses, the attempt to impose it on the court and jury would undoubtedly be a circumstance of much weight against the defendant. But if the evidence tending to prove an *alibi* is uncontradicted, the witnesses unimpeached, the facts testified to reasonable of themselves, and not disproved or contradicted, it would seem unreasonable to say that the attempt to establish the fact would be a circumstance tending to prove the defendant's guilt, simply because the evidence adduced does not satisfactorily account for the whereabouts of the defendant during the entire pe-

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riod of time within which the offense might have been committed.

We have been unable to find any authority in support of so broad a rule, except a passage in Wills on Circumstantial Evidence, p. 83, where it is said, that "an unsuccessful attempt to establish an *alibi* is always a circumstance of great weight against the prisoner, because a resort to that kind of evidence implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inference drawn from them, if they remain uncontradicted."

Such inferences may reasonably be drawn from an attempt to fabricate an *alibi* by false testimony, when that fact is disclosed; but where the evidence adduced is uncontradicted, and the facts testified to are probably true, but are deemed insufficient to establish the *alibi*, no good reason is perceived why the failure should, of itself, be taken as a circumstance to prove the guilt of the accused, or strengthen the evidence of the prosecution. The true rule in such cases, we think, is, that the fabrication of an *alibi*, like the wilful introduction of false and fabricated evidence in support of any other ground of defense, is a circumstance against the accused, to be weighed by the jury in connection with all the other evidence in the case. See Roscoe Crim. Ev. p. 17.

In the case at bar, it was testified by the prosecuting witness, that the offense charged was committed between the hours of twelve and one o'clock at night, outside of the house. The parties who committed the offense were partially disguised. The prosecuting witness testified to the identity of White in very positive terms. The general characters of the principal prosecuting witnesses were strongly impeached. The evidence given by four of the sons of White, who lived with him and slept in the same room, with that of two of the other parties accused, strongly tended to show that White was not present at the commission of the offense, but, on the contrary, was in bed at home, in the same neighborhood, when the offense was committed.

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The facts testified to by these witnesses were uncontradicted and unimpeached; and if they were not sufficient to prove an *alibi*, still we do not think the failure should be taken as an evidence of his guilt. We think the instruction given was erroneous and well calculated to mislead the jury, and for that reason a new trial should have been granted.

Judgment reversed, and the cause remanded for a new trial.

A. T. Rose and D. E. Beem, for appellant.

D. E. Williamson, Attorney General, for the State.

SUTTON v. JERVIS.

DESCENT.—*Surviving Wife.*—*Mortgage.*—A man during marriage purchased certain land which he entered upon and improved and of which he received from his vendor a deed of conveyance in fee simple, which was lost, misplaced, or destroyed by the grantee, without having been recorded; and, with his consent another deed was made to his son by said vendor. Afterwards the father and son executed a mortgage of the land, in which the wife of the former did not join. The father, son, and said wife resided as one family upon the land and cultivated it from the time of said purchase till the father and son died, leaving said wife surviving and said mortgage unpaid.

Held, that the surviving wife was entitled to one-third of the land in fee simple as against the mortgagees seeking to foreclose his mortgage.

APPEAL from the Knox Common Pleas.

RAY, J.—The appellee filed his complaint to foreclose a mortgage, making the appellant, Mary Sutton, a defendant, alleging, that she was the widow of Ebenezer Sutton, deceased, and the mother of Simon Sutton, deceased. Other heirs were made parties defendants.

The complaint charged, that said Ebenezer and Simon had executed and delivered a mortgage on certain described

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property, to secure certain debts to the appellee; that said Ebenezer had no interest in the land so mortgaged, but the same was the sole property of said Simon; and that the debts secured thereby were due and unpaid.

The appellant answered, that she and her husband occupied the land described in the mortgage up to the date of his death, and she still resided upon the same; that the title had been conveyed to her husband, and she had never joined in any conveyance or incumbrance of the property, and she was therefore entitled to one-third thereof in fee; and she asked that the same be set off to her.

Reply, that the sole title to the land was in the heirs of said Simon, and that Ebenezer never owned said land or had any interest in the same. A denial was also filed.

A motion was overruled to strike out the special paragraph of the reply. It should have been stricken out. The answer itself amounted to nothing more than a denial of the allegation in the complaint, that the entire title to the property mortgaged was in Simon Sutton; and the reply simply reaffirms this averment. But the error is harmless.

On the trial of the cause, the appellant proved by one Myers, that he was the former owner of the property, and as such owner had, some eight years before, sold the same to Ebenezer Sutton for the sum of one thousand dollars, and received from him two payments of about five hundred dollars; that said Ebenezer had taken possession of said land, built a residence, and resided therein with his family; that he had cleared and farmed some sixty or seventy acres of the land; that some three years after such purchase, Myers had executed a deed of said land, which was duly acknowledged and delivered to Ebenezer; that the deed was afterwards lost, misplaced, or destroyed by said Ebenezer, without having been recorded, and, with the consent of Ebenezer, Myers had executed another deed to Simon, the son of the appellant and said Ebenezer; that the appellant, her husband, and son, at the date of the purchase, were all living together as one family, and possessed and cultivated

the land up to the date of the death of said Simon and Ebenezer; and the appellant with the heirs of said Simon had continued to reside upon the same. The appellee then proved by said Myers that Ebenezer had said that the deed to him "was of no account."

Upon this evidence the court found that the appellant had no interest in the land, and entered a decree for the sale of the property under the mortgage.

The only ground upon which it can be contended that this finding should be sustained is, that the fact that Ebenezer Sutton lost, misplaced, or destroyed the deed conveying the property to him, and afterwards verbally consented that Myers should execute a conveyance to his son, estops the appellant from proving such a conveyance of the land to Ebenezer. *Speer v. Speer*, 7. Ind. 178; *Thompson v. Thompson*, 9 Ind. 323; *Bank of Newbury v. Eastman*, 44 N. H. 431; *Parker v. Kane*, 4 Wis. 1.

The voluntary redelivery, destruction, or canceling of the deed could, under no circumstances, reinvest the title in Myers. *Holbrook v. Tirrell*, 9 Pick. 105; *Botsford v. Morehouse*, 4 Conn. 550; *Gilbert v. Bulkley*, 5 Conn. 262; *Nason v. Grant*, 21 Me. 160; *Patterson v. Yeaton*, 47 Me. 308. But equity would not permit Ebenezer Sutton, as against a purchaser for value, to introduce parol evidence of the contents of the instrument so destroyed. He could not, after voluntarily depriving himself of the best evidence, introduce evidence of a lower grade. But this rule would not be applied as against the rights of a third party having acquired any interest in the land. *Nason v. Grant*, *supra*, and authorities there cited. In *Wilson v. Hill*, 2 Beasley, 143, it was held, that the title to lands vested in a married woman by an unrecorded deed cannot be divested by her parol consent that such deed may be canceled and a conveyance made by her grantor to her husband.

Our statute gives the surviving wife one-third of all the real estate of which her husband may have been seized in fee simple, at any time during the marriage, and in the convey-

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ance of which she may not have joined, in due form of law. 1 G. & H. 296, sec. 27. Certainly, the husband of the appellant was seized in fee simple of the land during the marriage, and the wife united in no conveyance of the title.

But the evidence does not show that there was any voluntary destruction of the deed by Ebenezer. He had received the title, entered upon the land, improved it, and at the date of the mortgage by Simon, the mortgagee, Jervis, was bound to take notice of such continued possession, not by his mortgagor, but by Ebenezer, in whom the legal title had vested.

There is nothing in the proof which could in any way deprive the appellant of her right to one-third of the property in question.

The cause is reversed as to the appellant, and remanded for a new trial. Costs.

W. F. Pidgeon, for appellant.

W. E. Niblack and *W. H. De Wolf*, for appellee.

MCBROOM v. THE CORPORATION OF LEBANON.

CORPORATION.—Promissory Note.—Party Plaintiff.—A note made payable to the treasurer of what purports to be a corporation, without giving the name of the treasurer, is, in effect, payable to the corporation, and shows that the corporation is the party in interest; and a suit on the note is properly brought in the name of the corporation.

SAME.—Estoppel.—It is well settled in this State, that where one contracts with what purports to be a corporation, he is estopped from denying the existence of the corporation at the date of the contract.

SAME.—Judicial Notice.—This court does not judicially know that there is not, or cannot be, a corporation by the name of the "Corporation of Lebanon," under the laws of this State.

APPEAL from the Boone Common Pleas.

McBroom v. The Corporation of Lebanon.

The appellant was sued before a justice of the peace, on a promissory note, as follows:

"\$50.00.

March 11th, 1867.

Thirty days after date I promise to pay to treasurer of Lebanon corporation, or order, fifty dollars, value received, without any relief whatever from valuation or appraisement laws.

MARTIN MCBROOM."

The note was filed as the only cause of action. The case was docketed and prosecuted in the name of the "Corporation of Lebanon." The appellant appeared and filled an answer of four paragraphs, consisting of a general denial and three special paragraphs in bar of the action. Replies were filed to the latter, and the issues thus formed were tried by a jury. The trial resulted in a verdict and judgment for the plaintiff. The appellant appealed to the court of common pleas, and there moved to dismiss the case for want of a sufficient cause of action, and also for want of proper parties, both plaintiff and defendant. This motion the court overruled, and the appellant excepted. On the trial of the cause before the court, a jury being waived, the note was offered in evidence, and the appellant objected for substantially the same reasons as those assigned in the motion to dismiss. The objections were overruled, and the note was received in evidence. Finding and judgment for the plaintiff below. A motion for a new trial was made and overruled.

To these several rulings exceptions were taken.

The action of the court in overruling the motion to dismiss, and in receiving the note in evidence, presents the only questions in this court.

ELLIOTT, C. J.—The code provides that every action must be prosecuted in the name of the real party in interest. 2 G. & H. 84, sec. 3. The note sued on, being made payable to the treasurer of what purports to be a corporation, without giving the name of the treasurer, is, in effect, payable to the corporation, and shows it to be the party in interest.

It is well settled in this State, that where one contracts

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with what purports to be a corporation, he is estopped from denying the existence of the corporation at the date of the contract. We do not judicially know that there is not, or cannot be, a corporation by the name of the "Corporation of Lebanon," under the laws of this State. We have various statutes under which a corporation might be legally organized in such a name.

We see no error in the rulings of the court complained of, and the judgment must therefore be affirmed.

The judgment is affirmed, with costs and ten per cent. damages.

C. C. Nave, for appellant.

A. J. Boone and *R. W. Harrison*, for appellee.

AYLESWORTH and Others v. BROWN and Another.

PRACTICE.—Admission of New Party.—Complaint on a note and mortgage, the plaintiffs claiming to be the surviving partners of a late firm named. Before any further pleadings had been filed, another person filed a petition, alleging, that he was a member of said late firm to which the note in suit was payable, and as such had an interest; and praying to be made a party plaintiff; and the court so ordered.

Held, the facts alleged in the petition being undisputed, that there was no error in this ruling.

SAME.—Pleading.—Amendment.—An amendment of the complaint, so as to show the facts alleged in such petition, could properly have been made, only after the court had authorized the new party to come in.

SAME.—The new party, having been admitted, over the defendant's objection, upon such petition, which was signed by his attorneys and the attorneys of the other plaintiffs, was, without formal amendment of the complaint, treated thenceforth throughout the case as a party plaintiff, without further objection.

Held, that, under the circumstances, such petition might, on appeal to this court, be regarded as an amendment to the complaint.

SAME.—Dismissal.—Disclaimer.—One of the original plaintiffs was allowed to dismiss the suit as to himself without filing a disclaimer.

Held, that it was his right to do so.

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SAME.—Interrogatories.—Harmless Error.—Where the defendant filed, with his answer, interrogatories to the plaintiff, which were answered, but the answers were not sufficient, and the court erroneously refused to compel him to answer, but it appeared by the record that the plaintiff was sworn as a witness, and as such testified fully to the facts sought to be elicited by the interrogatories, fully supporting, in that respect, the averments of the answer;

Held, that the error could not avail the defendant.

SAME.—Statement of Evidence to Jury.—Bill of Exceptions.—The statement of the evidence which a party is allowed to make to the jury by section 324 of the code is, as to its brevity or prolixity, a matter to be left, to a considerable extent, to the control of the court trying the cause; and where the interference of the court is complained of on appeal, the bill of exceptions must show the statement that was being made when the court interposed.

SAME.—Supreme Court.—The Supreme Court is not bound to express an opinion upon decisions of the lower courts which obviously result in no harm.

WITNESS.—Character.—Remarks of Court before Jury.—A cross interrogatory was put to a witness which had been already twice propounded and answered; and the court, upon objection made, refused to allow a third answer, remarking, in the hearing of the jury, that "when a witness of his standing and character had answered a question twice it was sufficient."

Held, that, under the circumstances of the case, there was no error.

PLEADING.—Code.—In a suit by surviving partners on a note payable to the firm, it was not shown in the body of the complaint what persons composed the late firm or how the right of action accrued to the plaintiffs as surviving partners, but these things were alleged in naming the parties plaintiffs.

Held, that such a method of stating facts, though not to be commended, is sufficient under the code.

JOINT DEBTORS.—Release.—A. held a judgment against B. and C. for a certain amount; B. paid half the amount, and thereupon A. executed to him a written instrument wherein A. covenanted that he would thenceforth "pursue the legal and equitable remedy on said judgment against C. alone, and not against B., looking to C. alone for the full and final payment and satisfaction of said judgment, without, however, intending to prejudice or interfere with the rights and liabilities of said B. and C. to each other on account of said judgment."

Held, that this instrument did not operate as a release of C. from liability upon the judgment.

APPEAL from the Fountain Common Pleas.

FRAZER, J.—This was a suit to foreclose a mortgage given by John R. Fallis, Jonas C. Aylesworth, Lucinda Plowman, and Nathan Plowman, to secure a promissory note made by Aylesworth. One paragraph of the complaint was against Aylesworth alone, and sought merely a personal

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judgment. The complaint, as amended, commenced thus:

"State of Indiana, Fountain County, Fountain Common Pleas Court, May term, 1868. Joseph Brown and John L. Meredith, surviving partners of the late firm of Barbee, Brown & Co., which said firm was composed of the following persons, viz: Joseph Brown, John L. Meredith, and William Barbee, which said Barbee is now deceased, vs. John R. Fallis, Jonas C. Aylesworth, Lucinda Plowman, and Nathan Plowman. Amended complaint. Paragraph 1st. Plaintiffs complain," &c., &c.

Before any further pleadings were filed, Thomas Barbee filed a petition in writing, alleging, that he was a member of the firm of Barbee, Brown & Co., to whom the note was payable, and as such had an interest; and praying to be made a party plaintiff. The court ordered that he be allowed to prosecute as a plaintiff, and the defendants excepted; and we are asked to consider the question.

There was no error in the ruling, the facts alleged in Barbee's petition being undisputed. The ninety-ninth section of the code warranted the proceeding; and if the facts alleged in the petition had appeared in proof upon the trial, it might have become the duty of the court, under the twenty-second section, to have required Barbee to be joined as a party. The argument that the complaint should have been amended so as to show the facts which were alleged in Barbee's petition, has no application whatever to this question. Such amendment could only be properly made after the court had authorized the new party to come in.

The sufficiency of the proof of service of summons on John R. Fallis is questioned upon grounds so very technical and insufficient, that, in view of the great multitude of like questions presented in this case, having nothing whatever to do with the merits of the controversy, we do not dwell upon it.

Meredith was allowed to dismiss the suit as to himself, the defendants objecting unless he filed a disclaimer. We are of opinion that it was his right to do so.

With their answer the defendants filed interrogatories to the plaintiffs, which were answered by the plaintiff Brown. Some of the answers were not sufficient, and the court erroneously refused to compel him to answer further. But this error cannot avail here; for it appears by the record that Brown was sworn as a witness, and as such testified fully to the facts sought to be elicited by the interrogatories, in that respect fully supporting the averments of the answer.

The appellants complain that the court would not allow their attorney to make to the jury a detailed statement of their evidence, but confined him to a general statement of it. This is a matter which must necessarily be left, to a considerable extent, to the court below. The statute authorizes a brief statement. We cannot know whether counsel have attempted to abuse this privilege by needless prolixity, unless the bill of exceptions presents to us, as it does not in this case, just the statement which was being made when the court interfered. We must presume that the judge interposed in the strict and intelligent discharge of his duty, unless the contrary distinctly appears. It must be evident, however, that the statute was never intended to give the privilege of wearing out the patience and endurance of judges and juries by compelling submission to the useless infliction of listening to a detail of all the *minutiae* which would enter into the body of the evidence in many cases. That would be exceedingly prolix, and could have no useful end. It would not be a *brief* statement, such as the code (sec. 324) authorizes. We cannot say that the court erred in the matter.

On the trial, the defendants, to prove a release to one Geiger (which will be alluded to again in this opinion), offered in evidence an affidavit which they had filed for a continuance, wherein it was stated that the witness had the release in his possession (giving a copy), and had been served with subpoena *duces tecum*, &c. The plaintiffs, to avoid the continuance, having, says the record, "admitted the affidavit.

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in the manner as the law directed, and that the witness would testify to the facts stated if he was present," the plaintiffs objected to the admission of the copy of the release contained in the affidavit, but the court admitted it merely as what the absent witness would swear to if present, the defendants excepting to this limitation of the effect of the copy in evidence. Subsequently, the plaintiffs, without proving its execution, were permitted, over the defendants' objection, to put in evidence what purported to be, and was afterwards proved to be, a duplicate of the same instrument. Both these rulings are complained of here. It is sufficient to say, that if the first would have injured the defendants, that injury was fully repaired by the second. We are not bound to express an opinion upon decisions of the lower courts which obviously result in no harm. It is useless to seek our decision upon such questions. They are not questions in any sense which require our action.

The statements of a third person, not the agent of the plaintiffs, were offered in evidence by the defendants, and excluded. This was obviously correct. It is argued by counsel that the agency had been shown; but we do not so understand the record.

A cross interrogatory was put by the defendants to a witness, which had been already twice propounded and answered. The court refused to allow the third answer, remarking, that "when a witness of his standing and character had answered a question twice, it was sufficient." This remark was excepted to. It is argued that it was error for the judge thus, in the hearing of the jury, to endorse the character of a witness. Ordinarily the court would not be justified in making such a remark in the presence of a jury trying a cause. It might have an effect upon the jury in determining the credit due to the witness. And yet the bearing of counsel towards the witness might be such as to make such an observation necessary from the bench, for the protection of the witness. In all cases it is the sworn duty of the jury to regard the evidence before them, uninfluenced

by such observations of the judge. It is fair to assume that this was done, in the absence of any indications to the contrary; nor indeed do we feel at liberty to say that the unwarranted repetition of the same question to the witness, and compelling the court to act upon it, by persistence, upon objection being made, did not, in the present instance, relieve the remark of the court from just criticism.

It is assigned for error, that the court overruled a demurrer by the defendants separately to the complaint. This was before Meredith ceased to be a plaintiff in the cause. One defect in the complaint relied upon is, that it does not show what persons composed the firm of Barbee, Brown & Co., and how the right of action accrued to the plaintiffs as surviving partners. We understand that these facts are alleged. It is true that this is not done in the body of the complaint, where it more properly belonged, but in naming the parties plaintiffs. We cannot commend this method of stating facts, nor have we any disposition to encourage it. But it is sufficient under the code, though awkward.

The regular and formal method of practice would probably have required, after Meredith retired from the case as a plaintiff, and Thomas Barbee was allowed to become a plaintiff, that the complaint should have been amended by striking out the name of the former and inserting that of the latter. This formal amendment to the complaint was not made, unless the petition of Barbee to be admitted as a plaintiff be regarded as such amendment. It was signed by Barbee's attorneys and by the attorneys of the other plaintiffs, and after the court ordered that he be admitted as a plaintiff, he was treated as such in all the proceedings, including the final judgment, without objection. Nor, indeed, is any question as to his being actually a party plaintiff raised upon the record before us, except upon the theory that the order of the court permitting him to become such was void. We do not deem it void, or even erroneous, as has been already seen. Taking it that he was a plaintiff, then, as the parties regarded him, the complaint as it

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stood showed no right of action in him. It is alleged, that the late firm of Barbee, Brown & Co., had been composed of three persons, of whom Thomas Barbee was not one. If the petition upon which Thomas Barbee was granted permission to appear as a plaintiff be regarded as itself an amendment of the complaint, it introduces the fact that Thomas Barbee was also a member of that firm. Can it be regarded here as such amendment? The majority of the court are clearly of opinion that it may be so regarded in this court, under the circumstances. With some hesitancy, I concur. This method, however, of amending a complaint is not commended, and if it appeared by the record that the defendants had in any manner sought below to take advantage of such informality specifically, possibly the question would be a more serious one for the appellees.

The remaining question in the case, and the only one in the whole record affecting its vital merits, arises upon a written instrument. Barbee, Brown & Co. held a judgment against Frederic Geiger and James Fallis for \$6,115.63. Geiger paid one-half thereof, and thereupon the instrument was executed to him, and contains the following covenants by the judgment plaintiffs, viz: "that they (Barbee, Brown & Co.) will henceforth pursue the legal and equitable remedy on said judgment against said James Fallis alone, and not against said Frederic Geiger, looking to said Fallis alone for the full and final payment and satisfaction of said judgment, without, however, intending to prejudice or interfere with the rights and liabilities of said Fallis and Geiger to each other on account of said judgment." The inquiry is, whether this operated as a release of Fallis from liability upon the judgment.

The general proposition is familiar, that the release of one of several joint debtors is a release of all the others; and the appellant contends that that proposition is applicable in this case.

This is not technically a release. By its terms it is merely a covenant not to pursue Geiger, and it is made clear by

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its words, that it was not intended to release Fallis. It is only by implication and to avoid circuitry of action that it would be construed to release Geiger. The cases seem to be uniform that such an instrument could not operate to release Fallis. The sole object which courts can have in the construction of instruments would be outraged by declaring this to be a release of both debtors. The law should not be subject to such a reproach. The cases upon the subject have been collected by Judge STORER in a valuable opinion in the Am. Law Register for May, 1869, vol. 8, p. 270, *Bailey v. Berry*. See, also, 1 Par. Con. (5th ed.) 28-9, and notes; Chit. Con. (10th Am. ed.) 862-3.

Judgment affirmed, with costs.

J. Buchanan, for appellants.

M. M. Milford, for appellees.

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THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD
Co. v. AVERY.

CHANGE OF VENUE.—*Rule of Court.*—A rule of the circuit court requiring an application for a change of venue on account of local prejudice to be made at least one day before the day for which the cause is docketed for trial, is reasonable and within the express power of such court to adopt.

SAME.—Where it is clearly made to appear that some act performed within the excluded time has excited such prejudice, or that such feeling already existing was undiscovered by reasonable effort, the case presents such special circumstances as to exclude the application of such rule intended for general convenience.

RAILROAD.—*Injury to Animals.*—*Fences.*—Where an animal was killed by the cars of a railroad company at a point where the road was securely fenced to within ten feet, on one side of the track, and within twenty steps, on the other, of a public crossing, "but the fences did not extend to the cattle-guard at the public crossing; if they did it would stop the cattle from going on the track;"

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Held, that the company was not relieved from liability by the fact that the road was securely fenced at the point where the animal was killed.

APPEAL from the Clark Circuit Court.

RAY, J.—Suit commenced before a justice of the peace for an animal killed by the cars of appellant at a point on the road which was not securely fenced. Appeal to the circuit court. Affidavit and motion for a change of venue on account of local prejudice, made on the day the cause was docketed for trial. Motion overruled, on the ground that the application was not made in time under the 45th rule of the Clark Circuit Court, which required such applications to be made “at least one day before the day for which the cause is docketed.”

We held in *Redman v. The State*, 28 Ind. 205, a rule that such applications should not be made after the day the cause is docketed for trial, was a reasonable one, and within the power of the court to enforce. In this case the time is limited to one day less, but the appellant has not availed himself of even this limitation; for his application is made upon the very day the case is set for trial on the docket. In view of the fact that prejudice so general in a county as to prevent a party from securing a fair trial must result either from some special act, real or fancied, exciting the prejudice of the public, or from some long continued course of conduct which has created and developed such feeling in the community, and that a prejudice so general cannot be concealed in ordinary cases, and the known abuse to which the statute is liable, the inconvenience to the court, the suitors, and the attending witnesses, caused by the uncertainty which must otherwise exist in regard to the proceedings of each day, we are inclined to hold a rule which in its general application can deprive the parties of no right, as a reasonable regulation, “expediting the proceedings and decisions of causes,”—“diminishing costs and remedying imperfections that may be found to exist in the practice”—reasonable and within the express power of the court to adopt. 2 G. & H. 8.

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There may be cases where the enforcement of such a rule would be in conflict with the statute. When such a case is presented, effect must of course be given to the language of the law. Where it is clearly made to appear that some act performed within the excluded time has excited such prejudice, or that such feeling already existing was undiscovered by reasonable effort, the case will present such special circumstances as to exclude the application of a rule intended for general convenience. The statute authorizes a change of venue. It also requires the circuit court "to adopt rules for conducting the business therein, not repugnant to the laws of this State, and in everything relating to simplifying and expediting the proceedings and decisions of causes, diminishing costs, and remedying imperfections which may be found to exist in practice."

When a circuit judge, acting under this requirement of the statute, has adopted general rules, it would be improper for us at the instance of a suitor in a special case to declare such rules "repugnant to the laws of this State" when such suitor has suffered no injury from their application in his case.

A prejudice existing against a railroad company, preventing a fair trial of the questions whether the road was or was not fenced at a particular point, and whether a horse was of a certain value, and where and by whom he was killed, might ordinarily be discovered before the day set for the trial. If there were special reasons why it could not be known in this case, the affidavit does not declare them.

We are indeed assured that the appellant suffered no injury in the present case from the enforcement of the rule, as the issues were submitted to the court for trial without the intervention of a jury from the prejudiced locality.

We regret that corporations are compelled so often to appeal to us for relief from findings which rest, not upon the evidence, but upon the prejudice of the jury. These real grievances render almost inexcusable the appeal where no actual wrong has resulted. This remark applies with equal force to the point presented upon the evidence.

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The proof was, that the animal was killed at a point where the road was securely fenced to within ten feet on one side of the track, and within twenty steps on the other side of the road, of a public crossing, "but the fences did not extend to the cattle-guard at the public crossing; if they did it would stop the cattle from going on the track." The road was thus "securely fenced" from one public crossing to another. We are asked by the appellant to reverse this case, because the road was securely fenced at the point where the animal was killed;—open at the end to permit cattle to enter, securely fenced to prevent their escape when the train was upon them. It seems unreasonable that counsel should expect a court to consider such a road so securely fenced as to relieve the corporation from liability.

Judgment affirmed, with costs.

G. V. Hawk and R. M. Weir, for appellant.

J. G. Howard and J. F. Read, for appellee.

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INTEREST.—*Rate of upon Judgments.*—The act of 1867, increasing the maximum rate of interest to ten per cent. when that rate is provided for by contract in writing, does not affect the third section of the act of 1861, enacting, that "interest on a judgment, or decree for money, shall be from the date of signing until the same be satisfied, at the rate per cent. agreed upon by the parties in the original contract, *not exceeding six per cent.*, and if there was no contract by the parties as to interest, then at the rate of six dollars a year on one hundred dollars."

SAME.—Suit on a promissory note, dated April 8th, 1868, and providing for the payment of interest at the rate of ten per cent. The court refused to require, as prayed by the complaint, that the judgment should draw interest at the rate of ten per cent.

Held, that this was not error.

APPEAL from the Cass Common Pleas.

ELLIOTT, C. J.—Suit by Smith against Thomas on a promissory note, as follows:—

“LOGANSPOUT, April 8th, 1868.

“One day after date I promise to pay to the order of John F. Smith, ninety dollars, with interest at ten per cent., value received.

JOHN N. THOMAS.”

The complaint prayed, that the judgment be so framed as to draw interest at the rate of ten per cent. until paid.

Judgment was rendered for the plaintiff for the amount of the note and accrued interest; but the court refused to require the judgment to draw interest at the rate of ten per cent. This refusal presents the only question in the case.

The third section of the act of March 7th, 1861, regulating interest on money, &c., (Acts 1861, p. 138) provides as follows:—

“Interest on a judgment, or decree for money, shall be from the date of signing, until the same be satisfied, at the rate per cent. agreed upon by the parties in the original contract, *not exceeding six per cent.*, and if there was no contract by the parties as to interest, then at the rate of six dollars a year on one hundred dollars.”

This is the only statutory provision now in force relating to interest on judgments generally.

Other provisions of the same act fixed the legal rate of interest at not exceeding six per cent. But the 1st section of the act of March 9th, 1867, (Acts 1867, p. 151) provides, “that interest upon the loan or forbearance of money, goods, or things in action, shall be at the rate of six dollars a year upon one hundred dollars, and no greater rate of interest shall be taken, directly or indirectly, unless the agreement to pay a higher rate of interest be made in writing, and signed by the party to be charged; but such rate of interest shall in no case exceed the rate of ten dollars a year on one hundred dollars,” &c.

It is claimed by the appellant, that it was the intention of the legislature, by the act of 1861, to allow on a judgment, rendered on a contract in which the rate of interest is spec-

Smith v. Thomas.

ified, the same rate of interest provided for by the contract, provided it does not exceed the highest rate allowed by the laws of the State in such cases, and that it was limited to not exceeding six per cent. only because that was the highest rate then allowed, in such cases; by the statute.

It is therefore insisted, that the act of 1867, as it increases the maximum rate to ten per cent. when provided for by contract in writing, as in this case, enlarges or extends the limitation of six per cent. in the third section of the act of 1861 to ten per cent. We cannot sustain this construction.

It is true, that by the first and second sections of the act of 1861, six per cent. is the maximum rate of interest on such contracts, and they also fix that as the legal rate when a less one is not specified in the contract. But the third section relates exclusively to interest on judgments and decrees for money, whether rendered on contracts or for torts, and fixes it at the rate of six per cent. unless the contract on which the judgment or decree is rendered provides for a less rate; but in no case can it exceed six per cent. Judgments on contracts for the loan of certain trust funds form an exception to this rule. See Acts of 1861, p. 84.

The act of 1867 relates exclusively to the rate of interest on contracts, and has no reference to interest on judgments or decrees, and does not therefore affect the third section of the act of 1861.

The contract is merged in the judgment rendered upon it; it no longer exists as a subsisting cause of action, and the judgment can only draw such rate of interest as may be expressly provided by statute.

Judgment affirmed, with costs.

D. P. Baldwin, for appellant.

S. T. McConnell and *M. Winfield*, for appellee.

PAINE and Others v. THE LAKE ERIE AND LOUISVILLE RAILROAD COMPANY.

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128	283
31	283
181	245
133	266
31	283
134	550

JURISDICTION.—*Title to Real Estate.*—Where the main object of a complaint in the court of common pleas is to have satisfaction entered of a mortgage of real estate, there is no error in overruling a motion made by the defendant before answer to transfer the cause to the circuit court on the ground that the title to real estate is in issue.

RAILROAD.—*Consolidated Companies.*—A railroad company formed by the consolidation of two companies succeeds to all the rights of each of the corporations of which it is composed, and may compromise and settle a claim against one of them, and sustain an action to enforce the settlement.

SAME.—*Directors.*—*Fraud.*—Persons who are directors of a railroad company cannot acquire such an interest in the profits of a contract for the construction of the road as to give them a standing in a court of equity to interpose an objection to the consummation of a compromise between the railroad company and its contractor.

SAME.—*Stockholders.*—An arrangement made by persons who are directors of a railroad company with a contractor, by which such persons are to share in the profits of the contract for the construction of the road, can only be confirmed by the stockholders, and not by the directors of whom the guilty persons form a part.

PLEADING.—*Answer.*—*Costs.*—In a suit to enforce the entering of satisfaction of a mortgage, a party defendant against whom no relief is sought, but who is made a defendant merely to answer as to his pretended interest in the subject-matter of the suit, must file an affirmative answer if relief is sought by him. The general denial by such a party puts the plaintiff to such proof as will place such defendant in the wrong. He may save himself from costs by disclaiming any interest.

DEPOSITIONS.—*Suppression of.*—It is a sufficient reason for suppressing portions of a deposition, that such portions only tend to prove matters set up in a special answer and cross complaint to which a demurrer has properly been sustained.

EVIDENCE.—*Statute Book of Another State.*—A book purporting to be Swan and Critchfield's edition of the statutes of Ohio was offered and, over objection, admitted in evidence. By the title-page it appeared that it was "published by the State of Ohio, and distributed to its officers, under the act of the General Assembly."

Held, that there was no error.

SAME.—*Statute.*—*Corporation.*—*Pleading.*—Where a statute of another state constitutes a part of the organization of a corporation suing in this State, it is not necessary to its introduction in evidence by the plaintiff that it should have been pleaded.

Paine and Others v. The Lake Erie and Louisville R. R. Company.

VERDICT.—*Interrogatories.*—The court, of its own motion, required the jury, unconditionally, to answer certain interrogatories, which they answered without returning a general verdict.

Held, that the answers could stand as a special verdict.

APPEAL from the Fayette Common Pleas.

The appellee on the 10th day of May, 1867, filed her complaint in the Wayne Common Pleas, against the appellants, and George P. Eddy, Thomas Wadsworth, George T. M. Davis, George A. Robbins, John C. Fisher, executor of James Oswald, Alfred B. Williams, and the Lake Erie & Pacific Railroad Company.

The complaint averred, that the appellee was a corporation, organized under the laws of the States of Ohio and Indiana, with authority to construct and operate a railroad from Fremont, in Sandusky county, Ohio, to Rushville, in Rush county, Indiana. That the same was in process of construction, and that a portion of the line was located through the counties of Randolph, Wayne, Fayette and Rush, in the State of Indiana.

That the appellee was created by the consolidation of two existing corporations, to wit, The Fremont, Lima & Union Railroad Company, an Ohio corporation, authorized to construct and operate a railroad from Fremont to Union, a point on the line between said states, and The Lake Erie & Pacific Railroad Company, an Indiana corporation, authorized to construct and operate a railroad from Union to Rushville. That the consolidation was perfected, and a board of trustees elected for the new company in March, 1865. That the appellee by virtue of the consolidation acquired the franchises, rights, and property of the constituent companies, and became liable for their indebtedness.

That prior to the consolidation, The Lake Erie & Pacific Railroad Company had executed a mortgage in the form of a deed of trust to said George T. M. Davis and George A. Robbins, of the line of its contemplated road, with its rights, franchises, etc., a copy of which is exhibited, conditioned for the payment of eight hundred and ninety bonds,

for one thousand dollars each, and delivered said bonds and mortgage to said trustees, to be held by them for the company, and not to be negotiated or disposed of, except by her direction.

That The Lake Erie & Pacific Railroad Company, prior to the consolidation, entered into a written contract with James Oswald, now deceased, for the construction of her road. That, as part of the consideration of the contract, said company stipulated that, upon certain conditions, said bonds should be delivered to said Oswald. That Oswald, prior to the consolidation, commenced the construction of said road, under the contract, and progressed therewith to a considerable extent, then ceased to work, leaving the road unfinished, and the rights of the parties unsettled, until adjusted in the manner hereinafter stated. That said contract was procured to be made by the fraud and collusion of the appellants and said Eddy and Oswald. That the appellants and said Eddy were directors of the company when the contract was made, and it was entered into through their agency. That there was a secret and fraudulent agreement between said Oswald and said directors, that they should participate in the profits of the contract. That the work done under the contract was done through the agency of sub-contractors, and was paid for with the means of the company.

That after the abandonment of said work, and prior to said consolidation, a secret meeting of the board of directors of The Lake Erie & Pacific Railroad Company was called and convened at Suspension Bridge, in the State of New York, without adequate notice to the directors not acting in collusion with said Oswald, the place of meeting having been fixed at a place remote from the office of the company, for fraudulent purposes. That said meeting was held on the 14th day of November, 1864, and the only directors of the company present were the appellants and said Eddy; and that said Oswald was present. That said Oswald submitted to the board of directors, thus organized,

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a written proposition to cancel his said contract, in consideration of the delivery to him of seventy of said mortgage bonds, said bonds to be afterwards exchanged for a like amount of the mortgage bonds of the consolidated company, negotiations for such consolidation being then pending, and the surrender and cancellation of the remainder of the said eight hundred and ninety bonds; and that upon the delivery to said Oswald of the bonds of the consolidated company, secured by a mortgage of the consolidated road, the seventy bonds of The Lake Erie & Pacific Railroad Company were to be surrendered, and the mortgage to secure them executed by said company was to be canceled and satisfied. That the proposition by said Oswald was accepted by said directors, the object being to secure to said Oswald and said directors seventy of said bonds of the consolidated company, and, in the meantime, to secure said seventy bonds of The Lake Erie & Pacific Railroad Company to be retained by said trustees, so that it would be impossible for the consolidated company to mortgage its road free from incumbrances without providing for them.

That the action of said board of directors, as to said compromise, was entered of record upon the records of said company, and the other directors of the company, becoming advised of it, controverted its validity, and the matter remained unsettled at the time of said Oswald's death, which occurred on the — day of —, 18—, at Stanford, Canada West, where he was domiciled, where his will was proved, and letters testamentary thereof were granted to the defendant John C. Fisher.

That said John C. Fisher, as executor of said Oswald, for a valuable consideration, paid to him by the defendant Alfred B. Williams, by a written instrument sold and assigned to him said contract and all the rights of said estate therein, with power to said assignee to compromise and settle all unsettled matters growing out of said contract, and to satisfy and cancel the same. That the assignment was dated the 11th day of July, 1866; but the terms thereof had been under ne-

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gotiation, and it was understood between said parties that the consolidation had been perfected, and that the appellee was liable to pay any claim against said Lake Erie & Pacific Railroad Company, in favor of said estate, growing out of said contract.

That, pending the negotiations between said Williams and said Fisher, said Williams was negotiating with the appellee the terms of settlement with her, in the event he became assignee of the rights of said Oswald's estate. That, on the 14th day of June, 1866, said Williams and the appellee agreed in writing that in the event of the former becoming assignee of said Fisher, as aforesaid, he would settle with the appellee all claims in favor of said Oswald, or his estate, growing out of said contract, against the appellee or The Lake Erie & Pacific Railroad Company, and discharge the appellee therefrom, and cancel said contract. In consideration of which the appellee agreed to deliver to said Williams twenty-three thousand dollars, at their par value, of first mortgage bonds of the appellee, drawing seven per cent. interest, payable semi-annually, secured by a first mortgage upon the portion of the appellee's route between Union and Cambridge City, in the State of Indiana, to be delivered as soon as practicable after the preparation of the mortgage and bonds and the cancellation of the first mentioned mortgage. That the appellee also agreed, when said Williams should furnish written evidence of the consummation of said arrangement between said Fisher and himself, to pay him the sum of one thousand seven hundred and fifty dollars, to be applied as in said agreement is specified, and also to pay a judgment of about thirteen hundred dollars, indebtedness of the Lake Erie & Pacific Railroad Company, on which, however, a judgment had been taken against said Oswald.

That said Williams, having procured from said Fisher, executor of said Oswald, the assignment and authority aforesaid, on the 11th day of February, 1867, endorsed upon a duplicate original of the contract between said Oswald

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and the Lake Erie & Pacific Railroad Company, a written cancellation thereof, and released said company from all liability thereon, and directed the trustees, said Davis and Robbins, to surrender to the plaintiff said mortgage and the bonds secured by it.

That the plaintiff having entered into the agreement with Williams, and being advised that he had become the assignee of the interest of said Oswald, as aforesaid, she, with a view to carrying into effect the contract with said Williams, and with a view to completing the line of said consolidated road, executed two mortgages, the two covering the whole of the road covered by the original mortgage, but being upon different parts thereof, and caused the same to be recorded, and executed her mortgage bonds, amounting, at the par value thereof, to the sum of one million dollars, and delivered the mortgages and the principal part of said bonds to the defendant Davis, the mortgagee and trustee named in said mortgages, the bonds to be by him disposed of upon the order and for the use of the plaintiff, as soon as the original mortgage and the bonds secured thereby should be canceled.

That, to facilitate said cancellation, the plaintiff sent an agent to New York, where said Davis and Robbins reside, with the original contract with said Oswald, and the endorsement of said Williams thereon, and with money to pay said trustees for their services.

That said agent tendered them said money, but they, for reasons hereinafter stated, declined the same, and declined to surrender the bonds.

That said agent was also authorized to deliver to said Davis, the trustee of the new mortgage on that portion of the plaintiff's road between Union and Cambridge City, the bonds secured by said mortgage, of the par value of twenty-three thousand dollars, for the benefit of said Williams.

That the plaintiff has paid said Williams the sum of one thousand seven hundred and fifty dollars, and has, satisfactorily to said Williams, satisfied said judgment of one thou-

said three hundred dollars, rendered against said Oswald.

That, by reason of the premises, the plaintiff is entitled to have the original bonds, amounting to the sum of eight hundred and ninety thousand dollars, and the interest coupons originally attached thereto, delivered up, to be canceled, and the mortgage securing the same released and satisfied by said trustees.

That the plaintiff is advised that said Davis and Robbins, said Fisher, and said Williams, are willing to have said bonds and coupons canceled, and said mortgage released and declared satisfied; but that the said Paine, Eddy, Fay, and Webb, being advised of the aforesaid facts and the rights of the plaintiff, notified said Davis and Robbins that they were interested in seventy of the said original bonds of The Lake Erie & Pacific Railroad Company, under and through said Oswald and the pretended compromise made at Suspension Bridge aforesaid, and that if they surrendered said bonds and satisfied said mortgage, they would hold them liable for a breach of trust.

That the defendant James Wadsworth, of the city of New York, also claims an interest in said seventy bonds.

That said Davis and Robbins decline to surrender said bonds and satisfy said mortgage, in consequence of said claims.

That said Paine, Eddy, Fay, and Webb, have no interest in said bonds, except as before stated, and, for the reasons stated, their claims are without foundation. That if the same are not void, as between themselves and the estate of said Oswald, their claim is exclusively against said estate, and they have no claim against said bonds, or against the plaintiff.

The plaintiff, in conclusion, prays that it be decreed that said bonds be surrendered for cancellation, and that said mortgage be decreed satisfied.

The exhibit annexed to the complaint is a mortgage, or deed of trust, containing the usual provisions contained by

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such instruments, dated the 31st day of March, 1863, executed by The Lake Erie & Pacific Railroad Company to George A. Robbins and George T. M. Davis, of New York, as trustees for the bondholders. It mortgages the road, franchises, etc., of the company, extending from Rushville to Union, etc., to secure the payment of eight hundred and ninety bonds, of one thousand dollars each, payable in New York, on the 1st day of June, 1890, with interest from and after the first day of June, 1863, at the rate of seven per cent. per annum, payable semi-annually, on the 1st day of June and December of each year.

The instrument was duly executed by the corporation, the trust accepted by the trustees, and the instrument duly recorded.

On the 17th day of September, 1867, the defendants Paine, Fay, and Webb, moved that the cause be transferred to the Wayne Circuit Court, because the title to real estate was in issue; but the court overruled the motion, and they excepted.

They then demurred to the complaint for the reasons, that it did not state facts sufficient to constitute a cause of action; because the plaintiff had not legal capacity to sue; and because the court had not jurisdiction of the subject of the action.

The court overruled the demurrer, and they excepted.

The defendants Nicholas E. Paine and John D. Fay answer the plaintiff's complaint in three paragraphs.

The first paragraph of the answer is a general denial.

The second is a cross complaint against the plaintiff and their co-defendants, and also against Sylvester Medberry and La Q. Rawson, denying all the charges of fraud, bad faith, and improper conduct, charged in the complaint, and averring, that all they did as directors of said Lake Erie & Pacific Railroad Company, and as individuals, was without fraud, and in good faith, and for the best interests of said company; that said company contracted, December 25th, 1861, with James, Oswald, deceased, for furnishing materi-

als and constructing said road, from Rushville, Rush county, Ind., to Union, Randolph county, Ind.; that by said contract said Oswald was to be paid by said company for said work, labor, and materials, per mile, as follows: \$16,000 in the first mortgage bonds of said company, bearing seven per cent. interest, payable semi-annually, in New York; \$8,000 in the capital stock of said company; and \$3,500 in cash. Said contract cannot be exhibited as a part of this answer, because the same is in the possession of the plaintiff. That at the time of the execution of said contract said company was without means, and wholly without credit, and dependent upon future acquisitions for means to prosecute said work, and said contract was made by the directors of said company in good faith, and, considering the means, credit, and circumstances surrounding said company, was advantageous to her. That at the time of making said contract, and for a considerable time thereafter, these defendants and said Webb and Eddy had no interest in the same, direct or indirect. That on account of the financial troubles consequent upon the late war, said Oswald proposed to abandon his said contract, and these defendants and said Webb and Eddy, desiring the construction of the road, and believing such abandonment would destroy it, accepted a proposition from said Oswald, and entered into a written agreement with him, February 21st, 1862, (copy filed herewith, marked Exhibit No. 1) by which they were to aid him in performing his contract, and share equally the profits or losses arising therefrom. That said Lake E. & P. R. R. Company was designed by its projectors and stockholders to be a link in a series of roads, which, together, would constitute a direct route from Fremont, upon Lake Erie, to Louisville, Ky., and that the Fremont, Lima & Union Railroad Company, a road existing under the laws of Ohio, the proposed route of which was from said town of Union to said town of Fremont, was being constructed as the north-east link in said projected route from Fremont to Louisville. That said Oswald proceeded with the execution of said contract

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until about December 1st, 1864, and was then entitled by the contract to \$132,606 cash, and \$803,088 in stock. That certificates of stock were duly and legally issued to him according to the provisions of the by-laws of said Company, as were also certificates for a considerable amount of stock to which said Oswald became entitled as a cash subscriber, and assignee of cash subscribers, amounting, at its par value, to the sum of \$——.

That about this time the stockholders of said Lake E. & P. R. R. Co. and of the F. L. & U. R. R. Co. became desirous of consolidating said roads, in furtherance of said plan to secure an unbroken line from Fremont to Louisville, and it thereupon became necessary to cancel said Oswald contract, and adjust the terms of such cancellation. That said Oswald submitted, November 14th, 1864, to the board of directors of the Lake E. & P. R. R. Co., at a meeting of said board at Suspension Bridge, N. Y., a written proposition, stating the terms upon which such cancellation might be made. Said proposition is filed herewith marked Ex. No. 2. That at the same time and place the President of the F. L. & U. R. R. Co. was present, acting for said company, and by its authority, and, with the directors of the Lake E. & P. R. R. Co., regarding said proposed consolidation as a matter certain to be consummated, for and on behalf of his said company, acted concurrently with the directors of said Lake E. & P. R. R. Co., in negotiating for and canceling said Oswald contract; and in behalf of the same, and in behalf of his own company, and for the benefit of said anticipated consolidated company, executed, with Oswald, a written contract, dated Nov. 14th, 1864, filed herewith as Ex. No. 3. And then and there the board of directors of the Lake E. & P. R. R. Co. unanimously adopted a resolution accepting Oswald's proposition, and canceling his contract; said action being upon the condition that said floating debt was paid and said bonds delivered as stipulated in said contract between said Oswald and said Rawson. A copy of said resolution is filed herewith, marked Ex. No. 4.

And said board then and there resolved, that, in their opinion, a consolidation of said Lake E. & P. R. R. Co. with the F. L. & U. R. R. Co. was expedient, and that such consolidation be made upon the terms agreed upon then and there by written contract, by and between the respective boards of directors of said companies; and said contract was signed by said boards, subject to the approval of the stockholders of their respective companies. That then and there said board of directors of the Lake E. & P. R. R. Co. resolved that an order be delivered to said Oswald directed to the defendants Davis and Robbins, trustees, mentioned in the mortgage annexed to the complaint, directing them, as soon as the said consolidation was perfected, and first mortgage coupon bonds upon the consolidated road of \$1,000 each were issued, to deliver to said Oswald seventy of said bonds, which would be placed in their hands for that purpose, and thereupon to cancel all the bonds in their hands, eight hundred and ninety in number, secured by the mortgage annexed to the complaint, pass the same over to the consolidated company, and discharge said mortgage. Said order is filed herewith, marked Ex. No. 5. That all said orders, resolutions, and proceedings, were entered at large upon the order book of the Lake E. & P. R. R. Co., and were had in good faith, without fraud, and were deemed by the directors of said company for its best interest; and were not secretly conducted, but with the full knowledge and approbation of La Q. Rawson, then president of the F. L. & U. R. R. Co., and who is now, and has been continuously, since the consolidation, the president of the plaintiff. That on Dec. 6th, 1864, at a meeting of the board of directors of the Lake E. & P. R. R. Co., duly and legally held at Cambridge City, Wayne Co., Ind., said board, by resolution, adopted, ratified and confirmed the action of the board at Suspension Bridge, aforesaid, as to the consolidation and acceptance of Oswald's proposition and the cancellation of his contract. A copy of said resolution, as to Oswald's contract, is filed herewith, marked Ex. No. 6. That said pro-

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ceedings, etc., so adopted and ratified, as aforesaid, constituted the basis of the action of the stockholders in consummating said consolidation. That all said proceedings, etc., were without fraud, etc., and were considered by said board, and by all persons concerned, for the best interests of the road. That said Oswald performed all the agreements made by him in his said proposition to said board, and in his said contract with said Rawson. That all said proceeding had as aforesaid by the directors of the Lake E. & P. R. R. Co. were afterwards, by said company and the plaintiff, with a knowledge of all the facts and their rights in the premises, fully ratified and confirmed, and the consolidation was made with such knowledge. That the plaintiff, after said consolidation, with a knowledge of all the facts, and her rights in the premises, ratified and confirmed the action of said Rawson, and of said directors of the Lake E. & P. R. R. Co. That said Rawson is now, and has been continuously since the consolidation, the president and general agent of the plaintiff. That said Oswald, by said proceedings, contracts, and cancellation of said contract, became and was entitled to seventy of the first mortgage coupon bonds of \$1,000 each, secured by the mortgage annexed to the complaint, said bonds being in the hands of the defendants Geo. T. M. Davis and Geo. A. Robbins, as trustees therein mentioned. That said bonds, under the agreement made between said Oswald and said Paine, Fay, Webb, and Eddy, dated the 21st day of February, 1862, are the property of the parties to said agreement, each owning two-fifths thereof, said bonds being the profits of said Oswald in said contract, subject to the claims of said Davis and Robbins to compensation as trustees, and the claim of said Wadsworth.

That said Williams did not make the negotiations and consummate the contract and assignment with said Fisher, or the subsequent contract, assignment, and adjustment with the plaintiff, as in the complaint stated. That what he did was as agent of The Columbus & Indianapolis Central Rail-

road Co. and the Jeffersonville, Madison & Indianapolis Railroad Co. That the bonds alleged to be the property of said Williams, to be secured upon the portion of the road between Cambridge City and Union, are not the property of said Williams, but are really the property of said last mentioned railroad companies. That it is the determination of said companies that the plaintiff's road shall not be constructed between Cambridge City and Union. That said bonds, thus passing into their hands without consideration, are to be used as a part of the machinery to prevent the construction of said road between Cambridge City and Union, as stated.

That said Williams, said railroad companies, and the plaintiff had notice at the time of said negotiations with said Fisher, and at the time of said assignment to said Williams, of the rights of the defendants in said bonds.

That the plaintiff has not executed any first mortgage bonds upon her road, nor does she propose to do so; but, on the contrary, has executed two mortgages upon the portion of her road within the State of Indiana, one covering the portion between Rushville and Cambridge City, the other, the portion between Cambridge City and Union. The number and amount of bonds secured by each is unknown to the defendants, but the total amount is eleven hundred thousand dollars, payable in the year 1900.

That these defendants are the owners of two-fifths of said seventy bonds, subject to the claims of said Davis and Robbins and said Wadsworth as before stated.

That the stock surrendered by said Oswald was placed in the hands of Sylvester Medberry as an escrow, to be held by him, as shown by the contract between said Oswald and said Rawson, and never was returned to said Oswald.

The defendants pray that it be adjudged that they are entitled to two-fifths of said seventy bonds, and that said Davis and Robbins surrender the same to them. That an account be taken with said Davis and Robbins and said Wadsworth, if anything be due them, or either of them,

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and they offer to pay into court such sum as may be decreed due them. That said plaintiff and such of the defendants as this pleading is made a cross complaint against be required to make full and true answer thereto. The defendants pray for all other and proper relief, &c.

The third paragraph of the answer is also a cross complaint against the plaintiff and the defendants hereinafter named.

The defendants deny the charges of fraud and improper conduct made against them in the complaint.

They aver that the contract entered into by the Lake Erie & Pacific Railroad Co. with James Oswald was made in good faith on the part of the directors of said company, and with a view to its best interests, and was, considering the circumstances surrounding the company, an advantageous one for her.

Said contract was made on the 23d day of December, 1861, and at that time and for a long time thereafter, they had no interest in it, direct or indirect. That afterwards, on the 21st day of February, 1862, in consequence of the financial troubles of the country, Oswald was disheartened and proposed to abandon his contract; and these defendants, and others hereinafter to be mentioned, desiring the construction of the road, and knowing that such action by said Oswald would destroy the little credit the road had, accepted a proposition made them by said Oswald, that they should aid him in the performance of said contract and that the profits and losses upon said contract should be divided and borne equally by the parties to said agreement. The parties to said agreement were said Oswald, these defendants, and the defendants Eddy and Webb. A copy of said agreement is made part hereof, marked Exhibit No. 1.

That said Oswald proceeded with his work under the contract until it was estimated under the contract as follows: cash, \$132,606, and stock, \$303,088. That this work and materials were done and furnished prior to the 1st day of December, 1864.

About said date it was desired by the stockholders of the Lake Erie & Pacific Railroad Co. to consolidate said road with the Fremont, Lima & Union Railroad Co., with which road it was subsequently consolidated; the plaintiff being the consolidated company. That in anticipation of said consolidation, said Oswald submitted to the board of directors of the Lake Erie & Pacific Railroad Co. a proposition, agreeing that upon its acceptance his contract might be canceled. This proposition was submitted to a meeting of said board at Suspension Bridge, in the State of New York, on the 14th day of November, 1864. A copy of said proposition is filed herewith, marked Exhibit No. 2.

That in addition to the stock issued to said Oswald under said contract, he possessed a large amount of stock, to wit \$——, issued to him upon cash subscription.

That the said board of directors, believing it for the best interest of said corporation, adopted a resolution accepting the proposition of said Oswald, and canceled said contract. Said board also then and there adopted a resolution declaring that they deemed it expedient that there be a consolidation of said Lake Erie & Pacific Railroad Co. with said Fremont, Lima & Union Railroad Co., and that the consolidation be made upon the terms then and there agreed upon by the board of directors of each company, subject to the approval of the stockholders of said companies. The directors of said Lake Erie & Pacific Railroad Co. also then and there adopted a resolution, resolving that an order be delivered to said Oswald, directed to Messrs. Davis and Robins, the trustees mentioned in the mortgage annexed to the complaint, directing them, as soon as said consolidation was perfected and first mortgage coupon bonds upon the consolidated road of \$1,000 each were issued, to deliver to said Oswald seventy of said bonds, which would be placed in their hands for that purpose, and thereupon to cancel all the bonds (890) in their hands secured by said mortgage annexed to the complaint, pass the same over to the consol-

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idated company, and discharge said mortgage. A copy of said order, marked Exhibit No. 5, is filed herewith.

That all said orders, resolutions, and proceedings were entered at large upon the order book of said Lake Erie & Pacific Railroad Co., and were had in good faith, without fraud, and were deemed by said Directors for the best interests of said company; and were not secretly had, but with the full knowledge and approbation of La Q. Rawson, then president of the Fremont, Lima & Union Railroad Co., and who is now, and has been continuously since the consolidation, the president of the plaintiff.

That afterwards, on the 6th day of December, 1864, the board of directors of the Lake Erie & Pacific Railroad Co., at a meeting duly held at Cambridge City, Wayne county, Ind., by resolutions adopted and entered upon the corporation order book of said board, adopted, ratified, and confirmed the action of said board at Suspension Bridge aforesaid, to wit, on the 14th day of November, 1864, as to the subjects of consolidation and said Oswald contract. That said proceedings so adopted and ratified constituted the basis upon which said roads were subsequently consolidated.

That said Oswald, under said proceedings and the cancellation of said contract, was entitled to seventy of the first mortgage coupon bonds for \$1,000 each, secured by the mortgage annexed to the complaint, said bonds being in the hands of said Davis and Robbins, as trustees therein mentioned. That said Oswald performed all the agreements made by him in his proposition heretofore set out and accepted by the board of directors of said Lake Erie & Pacific Railroad Co. That said bonds, under the agreement dated February 1st, 1862, are the property of the persons specified in said agreement as therein stated, subject to the claim of said Davis and Robbins for compensation as said trustees and the claim of said Wadsworth. They aver that said Williams and the plaintiff had full knowledge of the rights of the defendants in said bonds, secured by said mortgage aforesaid, at the time of negotiation for and assignment of

said Oswald contract. That the plaintiff has not executed a first mortgage upon her whole road, nor does she propose so to do, but on the contrary has executed two mortgages upon the part of the road formerly known as the Lake Erie & Pacific Railroad Co., one covering the road from Rushville to Cambridge City, the other from Cambridge City to Union; but the number of bonds secured by each is unknown to the defendants, but the total amount these defendants charge to be \$1,100,000, payable in the year 1900.

The defendants aver that they are entitled to two-fifths of said seventy bonds, subject to the claims aforesaid, and they pray that an account thereof be taken, and such decree be made as is just and equitable; that the court decree that they are entitled to two-fifths of said seventy bonds; and that said trustees be adjudged to surrender the same to them.

They further allege that the stock surrendered by said Oswald was placed in the hands of Sylvester Medberry as an escrow, to be held by him until said seventy first mortgage bonds of the consolidated company were delivered to said Oswald; and he is made a party hereto, and required to answer this answer and cross complaint.

The plaintiff, said Wadsworth, Eddy, Webb, Davis, Robbins, Fisher as executor of Oswald, Williams, Medberry, The Lake Erie & Pacific Railroad Co., and La Q. Rawson, are made defendants to this cross complaint, and are required to answer the same.

The defendants pray that the court will, upon the final hearing herein, make such order and decree as equity and the rights of the parties demand.

Exhibits to the Answer.

No. 1.

Whereas James Oswald, Esq., of Canada West, did on the 23d day of December, 1861, enter into a contract with the Lake Erie & Pacific Railroad Company to construct a single track railroad, as set forth in said contract, from Rush-

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ville to Union, in the State of Indiana; and whereas it was understood by the undersigned that L. Q. Rawson was, in furtherance of said project, and as President of the Fremont & Indiana Railroad Company to give to said Lake Erie & Pacific Railroad Company, one hundred and fifty thousand dollars of the second mortgage bonds of said Fremont & Indiana Railroad Company, which were then valued at eighty cents on the dollar, but which said second mortgage bonds have been cut off by a secret foreclosure of the first mortgage bonds of said company; and whereas the undersigned have aided said Oswald and expect to aid him in the prosecution of said contract to completion: Now, therefore, in consideration of such aid, and furnishing, by L. Q. Rawson, on his part, an equivalent of first mortgage bonds of the Fremont & Indiana Railroad Company under its new organization, for those before mentioned as having been cut off, it is hereby mutually covenanted and agreed by and between the undersigned, that the net profits of the contract of said Oswald with said Lake Erie & Pacific Railroad Company shall be shared equal by the parties hereto as well as all losses, share and share alike.

Dated at Suspension Bridge, N. Y., February 21, 1862.

(Signed.)

JOHN D. FAY.

JAMES OSWALD.

D. WEBB.

GEO. P. EDDY.

N. E. PAINE.

No. 2.

SUSPENSION BRIDGE, N. Y., }
Nov. 14, 1864. }

To the President and Directors of the Lake Erie & Pacific Railroad Company:

GENTLEMEN, Having been informed that you are desirous of consolidating your line of road with the Fremont, Li-

ma & Union Railroad Company, in the State of Ohio, and in order to enable you to do so, that you request of me a proposition as to the terms upon which I will cancel my contract made with you on the 23d day of December, 1861, for constructing your said line of road, I beg leave to make the following proposals:—

1st. I will cancel and abrogate my said contract, upon your giving me seventy of the first mortgage coupon bonds of your said company, of one thousand dollars each, which bonds are to be exchanged for a like number, kind, and amount of bonds of the consolidated company, in time and manner hereinafter specified.

2d. You to pay the floating debt of said company, including five promissory notes of five hundred dollars each made by the directors of said company. The pressing portion of said debt to be paid at once, and the balance too as soon as practicable thereafter; I to pay all liabilities I have incurred since the first day of October last.

3d. I will settle and pay the trustees of said bonds, G. A. Robbins and Geo. T. M. Davis; will settle and pay the Hon. James Wadsworth for his services.

4th. You to give me an order upon said trustees for the balance of said bonds, 820 in number, and, also, for the bonds, seventy in number, which I am to have under this proposition; but all of said bonds shall be and remain in the hands of said trustees until the bonds of the consolidated company are issued and ready for delivery as herein-after stated, when said trustees shall cancel and exchange seventy of said bonds for a like number, kind, and amount of said consolidated bonds, which consolidated bonds they are to hold for the benefit of, and to deliver to, Mr. James Oswald, when called for by him; also, that they will, at such time, cancel and deliver to said consolidated company the balance of said bonds, eight hundred and twenty in number, and discharge the mortgage upon which said bonds are issued.

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5th. The bonds of the consolidated company to be issued and exchanged for the present bonds within six months from the date hereof.

6th. You to issue to me the amount of stock subscribed by me, and now due me as a cash payment upon my said contract for work already done.

(Signed.)

JAMES OSWALD.

No. 3.

This agreement by and between James Oswald, of Canada West, and L. Q. Rawson, of Fremont, Ohio, *witnesseth*: that said Oswald has agreed to endorse to L. Q. Rawson, and place in the hands of S. Medberry, of Columbus, Ohio, three hundred and sixty-nine thousand nine hundred and fifty dollars of the capital stock of the Lake Erie & Pacific Railroad Company, which the said Medberry is to have transferred on the books of said company to the said L. Q. Rawson, and take new stock therefor in his name, which certificate shall be endorsed in blank by said Rawson, and said certificates are to be held by said Medberry in trust until the said Rawson, or the consolidated company of the Fremont, Lima & Union Railroad Company and the Lake Erie & Pacific Railroad Company shall have paid off, or secured to be paid, the floating debt of said Company.

Second. And until seventy of the first mortgage bonds of the consolidated company of the Fremont, Lima & Union Railroad Company and the Lake Erie & Pacific Railroad Company are delivered by said Rawson, or some agent of the consolidated company, to the trustees named in the bonds of the Lake Erie & Pacific Railroad Company, subject to the order of said Oswald; the said debt to be paid, or secured to be paid within one year, and the said bonds delivered within six months from the date hereof; but if the said debts are not so paid, or secured to be paid as aforesaid, and said bonds so delivered, then, and in that case, the said stock is to be re-delivered to said Oswald by said Medberry, or to said Oswald's order.

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Third. When said debt is paid, or secured to be paid as aforesaid, and bonds delivered as above stated, the said Medberry shall deliver the said stock to said Rawson, or his order, and the said trust hereby created shall be ended and of no further effect.

In witness whereof, the parties have hereto set their hands and seals, this 14th day of November, 1864.

(Signed.)

JAMES OSWALD, [L. S.]

LA Q. RAWSON, [L. S.]

No. 4.

On motion of John D. Fay, seconded by D. Webb, the following resolution was unanimously adopted:

Resolved, That the proposition of James Oswald, submitted to this board, and which is hereinafter set forth, by which he rescinds and cancels his contract for the construction of the Lake Erie & Pacific Railroad, be, and the same is hereby accepted, with all its terms and conditions; and said contract is hereby declared void and of no further effect: *provided*, the floating debt is paid off by L. Q. Rawson, of Ohio, and the bonds delivered as per agreement between said Oswald and L. Q. Rawson, on this 14th day of November, 1864.

No. 5.

On motion of John D. Fay, seconded by N. E. Paine, it was resolved that the following order be delivered to James Oswald, to wit:

To Messrs. Davis & Robbins, Trustees, &c.:

GENTLEMEN, As soon as the proposed consolidation of the Lake Erie & Pacific and Fremont, Lima & Union Railroad Companies is perfected, and the first mortgage coupon bonds of such consolidated roads, of one thousand dollars each, are issued, you are requested to deliver to the undersigned James Oswald seventy of such consolidated bonds (that number to be placed in your hands for that purpose), and thereupon you are to cancel all the bonds (890) of the Lake Erie & Pacific Railroad Company now in your hands,

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and pass the same over to said consolidated company, and to discharge the mortgage therewith connected.

Yours truly,

(Signed.)

GEO. P. EDDY,
N. E. PAINE,
D. Webb,
JOHN D. FAY,

Directors of the Lake E. & P. R. R. Co.

Suspension Bridge, Nov. 14, 1864.

JAMES OSWALD, *Contractor.*

No. 6.

On motion of John D. Fay, seconded by N. E. Paine, it was

Resolved, That all other resolutions passed at Suspension Bridge, on said 14th day of November, and heretofore referred to, relating to the Oswald contract, so called, or otherwise, be and are fully confirmed and adopted. *Carried.*

At the same time the defendant Dwight Webb filed his answer in three paragraphs. The answer of Webb is the same in words, figures, and exhibits, as the foregoing answer filed by the defendants Paine and Fay, except that he claims an interest of one-fifth only in said seventy bonds.

On the 3d day of October, 1867, the plaintiff filed her demurrer to the second and third paragraphs of the answer and cross complaint of Paine and Fay.

At the same time the plaintiff filed her demurrer to the second and third paragraphs of the answer and cross complaint of Dwight Webb.

The court sustained said demurrers; to which rulings of the court the defendants excepted.

On the 7th day of October, 1867, the defendants Paine and Fay and the defendant Webb respectively filed their motions and affidavits for a change of venue; and thereupon the venue of this cause was changed to the court of common pleas, in the county of Fayette, State of Indiana.

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The plaintiff offered in evidence an act of the General Assembly of the State of Ohio, entitled, "An act to provide for the creation and regulation of incorporated companies in the State of Ohio," passed May 1st, 1852; and offered to read the same from Swan & Critchfield's edition of the Statutes of the State of Ohio.

The defendants objected to the introduction of the same for the following reasons: because the same was irrelevant and incompetent; because the same was not pleaded; and objected to the introduction of Swan & Critchfield's edition of the Ohio statutes in evidence, because the same did not purport to be printed under the authority of the State of Ohio.

Whereupon the court inspected the title-page of said compilation, which is as follows, to wit: "Published for the State of Ohio, and distributed to its officers under the act of the General Assembly," passed March 16th, 1860. "The Revised Statutes of the State of Ohio, of a general nature, in force August 1st, 1860, collated by Joseph R. Swan, with notes of the decisions of the Supreme Court, by Leander J. Critchfield. In two volumes. Vol. I. Cincinnati: Robert Clarke & Co., Law Publishers, 1860."

The court also inspected the reverse side of the title-page, on which is found the following: "Entered according to Act of Congress, in the year 1860, by Robert Clarke & Co., in the Clerk's office of the District Court for the District of Ohio."

The court also inspected the following, found on page 1646 of the second volume of said compilation: "Swan & Critchfield's Statutes, purchase and distribution of by the State. Act of March 16th, 1860. 57 v. stat. 42;" the act referred to not being published in the compilation.

The court thereupon permitted said act to be read in evidence, and the appellant excepted.

The act is as follows:

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"An act to provide for the creation and regulation of incorporated companies in the State of Ohio.

[Passed May 1, 1852. 50 vol. stat. 274.]

(18.) SEC. I. *Be it enacted by the General Assembly of the State of Ohio*, That any number of natural persons, not less than five, may become a body corporate, with all the rights, privileges, and powers conferred by, and subject to all the restrictions of, this act.

TO CREATE AND REGULATE RAILROAD COMPANIES.

(19.) SEC. II. That any number of persons as aforesaid, associating, to form a company for the purpose of constructing a railroad, shall, under their hands and seals, make a certificate, which shall specify as follows: 1. The name assumed by such company, and by which it shall be known. 2. The name of the place of the termini of said road, and the county or counties through which such road shall pass. 3. The amount of capital stock necessary to construct such road. Such certificates shall be acknowledged before a justice of the peace, and certified by the clerk of the court of common pleas, and shall be forwarded to the Secretary of State, who shall record and carefully preserve the same in his office; and a copy thereof, duly certified by the Secretary of State, under the great seal of the State of Ohio, shall be evidence of the existence of such company.

(20.) SEC. III. That when the foregoing provisions have been complied with, the persons named as corporators in said certificate are hereby authorized to carry into effect the objects named in said certificate, in accordance with the provisions of this act; and they and their associates, successors and assigns, by the name and style provided in said certificate, shall thereafter be deemed a body corporate, with succession, with power to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey, at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, and the same to alter at pleasure, and do all

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needful acts to carry into effect the object for which it was created; and such company shall possess all the powers, and be subject to all rules and restrictions provided by this act.

(21.) SEC. IV. Said corporation shall be authorized to construct and maintain a railroad, with a single or double track, with such side tracks, turn-outs, offices, and depots, as they may deem necessary, between the points named in the certificate, commencing at or within and extending to or into any town, city, or village, named as the place of the termini of such road, and construct branches from the main line to other towns or places within the limits of any county through which said road may pass.

Sections 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, are upon the subject of the general powers of the corporation.

(38.) SEC. XXI. That whenever the lines of railroad of any railroad companies in this State, or any portion of such lines, have been or may be constructed, so as to admit the passage of burden or passenger cars over any two or more of such roads continuously, without break or interruption, such companies are hereby authorized to consolidate themselves into a single corporation, in the manner following:

1. The directors of said two or more corporations may enter into an agreement, under the corporate seal of each, for the consolidation of the said two or more corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the number of the directors thereof, which shall not exceed thirteen; the time and place of holding the first election of directors; the number of shares of capital stock in the new corporation; the amount of each share; the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation; the manner of compensating stockholders in each of said two or more corporations who refuse to convert their stock into the stock of such new corporation; with such

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other details as they shall deem necessary to perfect such consolidation of said corporations, and such new corporation shall possess all the powers, rights, and franchises conferred upon such said two or more corporations, and shall be subject to all the restrictions, and perform all the duties imposed by the provisions of this act: Provided, that all stockholders in either of such corporations who shall refuse to convert their stock into the stock of such new corporation shall be paid at least par value for each of the shares so held by them, if they shall so require, previous to said consolidation being consummated.

2. Such agreement of the directors shall not be deemed to be the agreement of the said two or more corporations, until after it has been submitted to the stockholders of each of said corporations, separately, at a meeting thereof, to be called upon a notice of at least thirty days, specifying the time and place of such meeting, and the object thereof, to be addressed to each of such stockholders, when their place of residence is known, and deposited in the post office, and published for at least three successive weeks in one newspaper in at least one of the cities or towns in which each of said corporations has its principal office of business, and has been sanctioned by such stockholders by the vote of at least two-thirds in amount of the stockholders present at such meeting, voting by ballot, in regard to such agreement, either in person or by proxy, each share of capital stock being entitled to one vote; and when such agreement of the directors has been so sanctioned by each of the meetings of the stockholders separately, after being submitted to such meetings in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said two or more corporations.

(89.) SEC. XXII. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the Secretary of State, the said two or more corporations mentioned or referred to in the said first section, shall be

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merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned; and the details of such agreement shall be carried into effect, as provided therein.

(40.) SEC. XXIII. Upon the election of the first board of directors of the corporation created by the agreement in the twenty-first section of this act mentioned, and by the provisions of this act, all and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, all and singular their rights and interests in and to every species of property, real, personal, and mixed, and things in action, shall be deemed to be transferred to, and vested in, such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the right of way and all other rights of property, in the same manner and to the same extent as if the said two or more corporations, parties to such agreement, should have continued to retain the title and transact the business of such corporations; and the titles and the real estate acquired by either of said two or more corporations, shall not be deemed to revert or be impaired by means of anything in this act contained; Provided, that all rights of creditors, and all liens upon the property of either of said corporations, parties to said agreement, shall be and hereby are preserved unimpaired; and the respective corporations shall continue to exist as far as may be necessary to enforce the same; and provided further, that all the debts, liabilities and duties of either company shall thenceforth attach to such new corporation, and be enforced from the same, to the same extent, and in the same manner, as if such debts, liabilities, and duties had been originally incurred by it.

(41.) SEC. XXIV. Any railroad company heretofore or hereafter incorporated, may at any time, by means of subscription to the capital of any other company, or otherwise, aid such company in the construction of its railroad, for the purpose of forming a connection of said last mentioned

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road with the road owned by the company furnishing said aid; or any railroad company organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other company, if said companies' lines of said road are continuous or connected as aforesaid, upon such terms and conditions as may be agreed on between said companies respectively; or any two or more railroad companies whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created: Provided, that no such aid shall be furnished, nor any purchase, lease, or arrangement perfected, until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place, and in such manner, as they shall designate, and the holders of at least two-thirds of the stock of such company represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto."

The plaintiff then offered in evidence a certified copy of the charter and articles of association of the Fremont, Lima & Union Railroad Company.

The defendants objected to the introduction of the same for the following reasons: because the same is incompetent and immaterial; because the same is not according to the laws of the State of Ohio; and because the same is not properly proven and certified.

The court overruled the objection, and permitted the same to be read in evidence; to which ruling of the court the defendants excepted.

The certified copy of the articles of association thus offered in evidence recites, that Charles Congdon, of New York City, David J. Cory and Squire Carlin, of Hancock county, Ohio, and L. Q. Rawson and James Moore, of Sandusky county, Ohio, have associated themselves together to form a company, to be called the Fremont, Lima & Union Railroad Company, for the purpose of constructing a railroad from Fremont, Sandusky county, Ohio, through San-

dusky, Seneca, Hancock, and Allen counties, to Lima, in Allen county; thence through the counties of Allen, Auglaize, Mercer, and Darke, to the west line of the State of Ohio, in Darke county; and that the capital necessary to construct the same is \$1,500,000.

Said articles are signed and sealed by the parties aforesaid, and dated January 6th, 1862. The signing and sealing of the same is acknowledged before a justice of the peace of Sandusky county, Ohio. The clerk of the Common Pleas Court of Sandusky county, Ohio, certifies the official character of said justice of the peace. The Secretary of State of Ohio certifies that the foregoing is a full and true copy of the original certificate, with the acknowledgment and the certificate of the county clerk, filed and recorded in the Secretary's office, on the 21st day of January, 1862.

La Q. Rawson testified for the plaintiff, as follows: "I was one of the organizers of the Fremont, Lima & Union Railroad Company; and I was afterwards director and president of said company; I so continued until the consolidation of said company with the Lake Erie & Pacific Railroad Company, which was in the winter of 1864-5. There was a great deal of work done on the Fremont, Lima & Union Railroad. There were about thirty-seven miles in operation, and thirty-five miles graded. Directors were elected soon after filing the articles of association, and the organization was kept up by the election of officers, &c., up to the consolidation. The directors were elected on the 3d day of March, 1862. Seven were then elected."

The plaintiff then offered in evidence a certified copy of the articles of association of the Lake Erie & Pacific Railroad Company, which recites, that they whose names are signed to said articles are subscribers to the capital stock of said company, and that more than \$50,000 stock is now subscribed, and having elected a director for said contemplated road, they enter into and adopt the following articles of association:

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"1st. The corporate name shall be the Lake Erie & Pacific Railroad Company.

2d. The amount of capital stock to be \$1,000,000, to be divided into 20,000 shares of \$50 each.

3d. Number of directors to be seven. Present directors, G. B. Bush, T. Beeson, and A. White, of Indiana; Geo. P. Eddy, John D. Fay, and N. E. Paine, of New York; and La Q. Rawson, of Ohio.

4th. It shall be the duty of the directors to manage the affairs of said company.

5th. Said road shall extend from Rushville, Rush Co., Ind., through the counties of Rush, Fayette, Wayne, and Randolph, to a point on the east line of said Randolph county, in said State, at or near Union, at the southern terminus of the Fremont & Indiana Railroad, being the distance of sixty miles, or thereabout. Said road shall pass through or into no other counties."

Said articles are signed by the subscribers to the capital stock, setting forth the place of residence of each subscriber, and the number of shares so subscribed by him. The original is endorsed, "Articles of association of the L. E. & P. R. R. Co., filed in the office of Secretary of State, Oct. 6th, 1860."

The Secretary of State of Indiana certifies the foregoing to be a full and true copy of the original on file in his office.

Alfred B. Williams testified, as follows:

"I acted as agent of the Lake E. & P. R. R. Co. for three years, commencing during the first year of its organization. The greater portion of the grading was done, and 80,000 cross-ties were purchased and delivered on the road. Directors and officers were elected, and continued to be up to the consolidation. North of Cambridge all the road (33 miles) was graded except five miles, and the grubbing was done on this. Some culverts were also made, but no bridging was done. There were to be two bridges. South of Cambridge half of the grading had been done—about ten

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miles was done. Forty thousand dollars had been expended."

The plaintiff then offered in evidence a sworn and certified copy of the articles of consolidation between the Lake E. & P. R. R. Co. and the Fremont, L. & U. R. R. Co., from the office of the Secretary of State of Indiana.

The defendants objected to the same. The court overruled the objection, and permitted the copy to be read in evidence. To which ruling of the court the defendants excepted.

Said articles of consolidation were entered into on the 8th of December, 1864. Among other things said articles recite, that the corporate name of the consolidated company shall be the Lake Erie & Louisville Railroad Company. That the capital stock shall be six million dollars, divided into one hundred and twenty thousand shares of fifty dollars each. That the basis of the consolidation is to be as follows: The stockholders of the Lake Erie & Pacific Railroad Company, on the surrender of their stock to the consolidated company, shall receive stock certificates from the consolidated company for the amount of stock so surrendered in exchange thereof; and the stockholders of the Fremont, Lima & Union Railroad Company, on a like surrender of their stock, shall receive like certificates, with sixty per cent. added thereto, to equalize the stock representations of the two companies. The directors of each of said companies caused their president to officially sign this agreement, and affix the official seals of said companies.

(Signed.)

LA Q. RAWSON,

President of the Lake Erie & Pacific R. R. Co.

[L. s.]

ROYAL JENNINGS,

Secretary Lake Erie & Pacific R. R. Co.

[L. s.]

LA Q. RAWSON,

President Fremont, Lima & Union R. R. Co.

R. W. B. McLELLAN,

Secretary Fremont, Lima & Union R. R. Co.

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On the 13th of December, 1864, the directors of the F., L. & U. R. R. Co. met in their office, and the following proceedings were had:

The articles of consolidation, above set forth, were approved and adopted, and ordered to be submitted to the stockholders of said company, at a meeting thereof to be held in Fremont, Ohio, January 14th, 1865. The Secretary of said company certifies that such meeting of the stockholders was held as ordered, and that more than two-thirds of all the votes (each share representing a vote) were given for the adoption of the contract of consolidation.

On the 8th of December, 1864, the directors of the Lake Erie & Pacific R. R. Co. held a meeting at their office, and the following proceedings were had:

The articles of consolidation, above set forth, were adopted and ordered to be submitted to a meeting of the stockholders of their company to be held for that purpose at Cambridge City on the 18th of January, 1865. The secretary of said company certifies that such meeting of the stockholders was held as ordered, and that more than two-thirds of all the votes (each share representing a vote) were given for the adoption of said contract of consolidation.

The Secretary of State for the State of Indiana certifies, that the above and foregoing is a full, complete, and true copy of the consolidation contract, filed in his office February 4th, 1865.

The Secretary of State for the State of Indiana certifies, under oath, that, as such officer, he has custody of the original articles of association of the F., L. & U. and the Lake E. & P. Railroad Companies; that the foregoing is a true and full copy of the original; that said original has remained unaltered from its date to the best of his belief; that said original was demanded of him by an agent of said consolidated company, and that he declined to give it up, or allow it to be withdrawn from his office.

The plaintiff then offered in evidence an act of the General Assembly of the State of Ohio, passed April 10th, 1856,

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which took effect May 1st, 1856, entitled, "An act to authorize the consolidation of railroad companies in this State with railroad companies of States adjoining, in certain cases, and to authorize railroad companies in this State to extend their roads in adjoining States," as found in Swan & Critchfield's compilation of the laws of Ohio. The defendants objected to the introduction of said evidence for the following reasons: because the same is incompetent, and immaterial; because the same is not pleaded; because the same does not purport to be printed under the authority of the State of Ohio.

The court overruled the objection and permitted said act to be read in evidence; to which ruling of the court the defendants excepted.

Said act was then read in evidence, as follows:—

"An act to authorize the consolidation of railroad companies in this State with railroad companies of States adjoining, in certain cases, and to authorize railroad companies in this State to extend their roads into adjoining States.

[Passed April 10, and took effect May 1, 1853. 53 vol. Stat. 143.]

(162.) SEC. 1. *Be it enacted by the General Assembly of the State of Ohio*, That it shall be lawful for any railroad company in this State, organized under the general or any special law, or which may hereafter be organized in this State, and whose line of road shall be made or in the process of construction to the boundary line of the State, or to any point either in or out of this State, to consolidate its capital stock with the capital stock of any railroad in an adjoining State, the line of whose road has been made or is in process of construction to the same point, and where the several roads so unite as to form a continuous line for the passage of cars: Provided, that roads running to the bank of any river which is not bridged shall be held to be continuous under this act.

(163.) SEC. II. That said consolidation shall be made under the conditions and restrictions following—that is to say,

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First. The directors of the several corporations may enter into a joint agreement under the corporate seal of each company for the consolidation of said companies, and prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the number of the directors and other officers thereof, and their place of residence; the number of shares of the capital stock; the amount of each share; and the manner of converting the capital stock of each of said companies into that of the new corporation, with such other details as they shall deem necessary to perfect such organization and the consolidation of said companies.

Second. Said agreement shall be submitted to the stockholders of each of the said companies, at a meeting thereof, called separately for the purpose of taking the same into consideration; due notice of the time and place of holding such meeting, and the object thereof, shall be given by written or printed notices, addressed to each of the persons in whose names the capital stock of said companies stands on the books thereof, and also by a like notice published in some newspaper in the city or town where such company has its principal office or place of business. And at the said meeting of stockholders the agreement of the said directors shall be considered, and a vote, by ballot, taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote, and the ballots shall be cast in person or by proxy, and if two-thirds of all the votes of all the stockholders shall be for the adoption of said agreement, then that fact shall be certified thereon by the secretary of each of said companies, and the agreement so adopted, or a certified copy thereof, shall be filed in the office of the Secretary of State, and shall be deemed and taken to be the agreement and act of consolidation of said companies. And a copy of said agreement and act of consolidation duly certified by the Secretary of State, under the great seal of the State of Ohio, shall be evidence of the existence of said corporation.

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(164.) SEC. III. Upon the making and perfecting the agreement and act as provided in the preceding section, and filing the same or a copy with the Secretary of State, the several corporations; parties thereto, shall be deemed and taken to be one corporation, possessing within this State all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties of such corporation of this State so consolidated.

(165.) SEC. IV. It shall be the duty of the stockholders, at the meeting called to take into consideration said agreement as hereinbefore provided, after the adoption of the same, to appoint a time and place for the election of the directors and other officers of the new corporation, which may be provided for in said agreement, notice whereof shall be given by the secretary of each of said companies, in some newspaper printed at the place of the principal office of each of said companies, of the time and place of said election, at least three weeks previous thereto, which election shall be conducted in the manner that may be prescribed by said meeting of stockholders. •

(166.) SEC. V. Upon the election of the first board of directors of the corporation created by said agreement of consolidation, and by the provisions of this act, all and singular the rights, privileges, and franchises, of each of said corporations, parties to the same, and all the property, real, personal, and mixed, and debts due on account of subscriptions of stocks or other things in action, shall be deemed to be transferred and vested in such new corporation without further act or deed; and all property, all rights of way, and all other interests, shall be as effectually the property of the new corporation as they were of the former corporations parties to said agreement; and the title to real estate, either by deed, gift, grant, or by appropriations under the laws of this State, shall not be deemed to revert or be impaired by reason of this act: Provided, that all rights of creditors, and all liens upon the property of either of said corporations, shall be preserved unimpaired, and the respective corporations, may

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be deemed to be in existence to preserve the same; and all debts, liabilities and duties, of either of said companies, shall thenceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities, and duties, had been contracted by it.

(167.) SEC. VI. Such new company shall, as soon as convenient, after such consolidation, establish a principal office at some point in this State on the line of its road, and change the same at pleasure, giving public notice in some newspaper of such establishment or change.

(168.) SEC. VII. Suits may be brought and maintained against such new company in the courts of this State for all causes of action in the same manner as against other railroad companies in this State.

(169.) SEC. VIII. That portion of the road of such consolidated company in this State, and all its real and personal property, shall be listed for taxation and taxed in the same manner as the road and property of other railroad companies in this State. To ascertain the proportion of the rolling machinery, subject to taxation in this State, the officer listing the same shall ascertain the value of the rolling machinery of such company, and return a sum bearing the same proportion to the value of the whole that the length of the line of such road within this State bears to the length of the whole line.

(170.) SEC. IX. That any railroad company now organized or which may hereafter be organized in this State for the purpose of constructing a railroad to the boundary line of this State, shall be authorized to extend its road into and through any adjoining State under the regulations which may be prescribed by such adjoining State, and the rights, powers, and privileges of such company over such extension, in construction and use of such road in controlling the property and applying money and assets thereon, shall be the same as if said road had been built wholly within this State.

(171.) SEC. X. Any stockholder who shall refuse to con-

vert his stock into the stock of the consolidated company shall be paid the highest market value of such stock at any time within six months next preceding the time of the making of such agreement for consolidation by the directors, if previous to such consolidation he shall so require; and if the stockholder so refusing to consolidate, and the board of directors of the company desiring to consolidate, can not agree as to the value of said stock, it shall be lawful for the parties to submit the question to arbitration, which arbitration shall be conducted in accordance with the provisions of the law in force regulating arbitrations (so far as the same may be applicable), by three disinterested persons, to be appointed upon the motion of either of the parties by the judge of the court of common pleas of the county in which the person owning the stock shall reside, or, in case he be a non-resident of the State, or of any county through which said road shall pass, then in the county in which the principal office of the company shall be kept; and if the person so refusing to convert his stock shall refuse to submit the question to arbitration, the proper judge shall, upon the application of any director of either of the companies desiring to consolidate, appoint the arbitrators, who shall proceed to ascertain the value of the stock the same as if the question had been submitted by the consent of both parties; and if the party owning the stock shall refuse to receive the amount awarded, in any case provided for in this section, it shall be lawful for the company to deposit the same with the clerk of the court of common pleas of the county in which the arbitration shall be held, which deposit shall authorize the parties to proceed to consolidate without further payment to such stockholder.

(172.) SEC. XI. In all cases of arbitration under the provisions of the foregoing section, it shall be the duty of the party desiring such arbitration to give the opposite party at least ten days notice of his intention to apply to the judge for the appointment of the arbitrators, which notice shall be served in the same manner as is provided for the service

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of a summons, and shall specify the time and place of the hearing of such motion: Provided, that in cases of non-residents the notice shall be by publication made in the same manner, and for the same time, as provided by sections seventy, seventy-one, and seventy two, of the act entitled "an act to establish a code for civil procedure," passed March 11, 1853."

The plaintiff then offered in evidence a certified and sworn copy of the articles of consolidation of the Fremont, Lima & Union R. R. Co. with the Lake Erie & Pacific R. R. Co., from the Secretary of State's office of the State of Ohio.

The defendants objected to the introduction of the same for the following reasons: because the same is incompetent and immaterial; because said consolidation is not according to the laws of Ohio; because it is not according to the laws of Indiana; because said constituent corporations are situate in different States; and because the same are not properly proven and certified.

The court overruled said objection and permitted the articles to be read in evidence. To this ruling of the court the defendants excepted.

Said articles of consolidation are the same as heretofore set out. The Secretary of State for the State of Ohio certifies to said articles of consolidation in the same manner as the Secretary of State for the State of Indiana, as heretofore set out.

La Q. Rawson then identified the record of the Fremont, Lima & Union Railroad Company.

The plaintiff then offered in evidence certain entries found therein. The defendants objected to the same for the following reasons: because the same is incompetent and immaterial; because the same is not according to the laws of Ohio; because the same is not according to the laws of Indiana; because said constituent corporations are in different States.

The court overruled said objections, and permitted the

entries to be read in evidence. To the ruling of the court therein the defendants at the time excepted.

The evidence thus introduced is, in substance, as follows:

A special meeting of the directors of the Fremont, Lima & Union R. R. Co. was held in Fremont, Ohio, December 13th, 1864. Present at said meeting, La Q. Rawson, C. W. Foster, James Moore, and R. W. B. McLellan. The following proceedings were had:

The contract of consolidation (heretofore set out) was approved and adopted, and the same was ordered to be submitted to the stockholders at a meeting thereof to be held at the company's office in Fremont, Ohio, January 14th, 1865; and the Secretary was directed to notify said stockholders.

Said contract of consolidation (as heretofore set out) is there spread out as the one referred to above.

On the 3d day of December, 1864, the directors of the F., L. & U. R. R. Co. met at the company's office in Fremont, Ohio. Said meeting was called by the president, La Q. Rawson, to consider the contract of consolidation, and the following proceedings were then and there had:

The said contract was approved and adopted, and all the doings of said board at their meeting on the 13th day of December (as above set out) were approved and adopted as the act and deed of said company; and the president and secretary were authorized to purchase for said company first mortgage bonds of the Fremont & Indiana Railroad Company at par, and to pay therefor in the capital stock of this company, and the purchase of certain of said bonds heretofore made by the president and secretary was approved and confirmed.

At a meeting of the stockholders of the Fremont, Lima & Union R. R. Co., held at the company's office in Fremont, Ohio, January 14th, 1865, the following proceedings were had:

The contract of consolidation (heretofore set out) was

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adopted; and a meeting of the stockholders of this company, and of the Lake Erie & Pacific R. R. Co., of Indiana, was ordered to be held in Union City, on the 22d of February, 1865, to elect nine directors of the Lake Erie & Louisville R. R. Co.

At a meeting of the stockholders of the F., L. & U. R. R. Co., held February 3d, 1865, the following proceedings were had:

It was ordered that the meeting of the stockholders of this company, with the stockholders of the Lake Erie & Pacific R. R. Co., meet at Findley, Hancock county, Ohio, on the 1st day of March, 1865; and that the meeting last above ordered be set aside.

The record of the Lake Erie & Pacific R. R. Co. was then identified.

The plaintiff then offered in evidence certain entries found therein.

The defendants objected to the same, for the following reasons: because the same is incompetent and irrelevant; because said proceedings are not according to the laws of Ohio; because they are not according to the laws of Indiana; because said corporations are in different States.

The court overruled the objection, and permitted the entries to be read in evidence. To the ruling of the court therein the defendants, at the time, excepted.

The evidence thus admitted is, in substance, as follows:

At a meeting of the directors of the Lake Erie & Pacific R. R. Co., at the company's office, in Cambridge City, on the 8th day of December, 1864, the following proceedings were had:

The contract of consolidation (heretofore set out) was adopted; and the same was ordered to be submitted to the stockholders of this company, at a meeting to be held on the 18th day of January, 1865.

On January 30th, 1865, notice was given to the stockholders of the Lake Erie & Pacific R. R. Co., that said contract of consolidation was ratified and adopted by the stock-

holders of each of the constituent companies thereto respectively; and that a meeting of the stockholders of said companies would be held at Findley, Hancock county, Ohio, on the 1st day of March, 1865, to elect directors for the consolidated company.

N. H. Johnson testified for the plaintiff, as follows: "I was attorney for the L. E. & P. R. R. Co., from April 28th, 1862, to the consolidation. I was present when the vote of the stockholders was taken upon the question of consolidation. This vote was taken at the office of the L. E. & P. R. R. Co., at Cambridge City, commencing on the 18th day of January, 1865, and continued by adjournment on account of the pendency of a complaint in injunction before Judge Wilson, of the Common Pleas of Wayne county. I was a stockholder, and I am now. I had two shares. I was one of the three judges of the election, and was chairman. I kept the tally sheet and register of votes. There is no record in preservation of that vote. I handed the minutes of the meeting to the Secretary. I have since, with the officers of the company, made diligent search in the office of the company for them, but have been unable to discover anything. The vote was not all cast that day, because Judge Wilson, the day before, granted a temporary injunction, enjoining the voting of stock to the amount of \$143,000, which had been issued to Oswald by the company. The stock of all desiring to vote was voted except this. The election was then adjourned for three days. When that time had expired the judge had not decided the case. We adjourned to a subsequent day when we had a final decision dissolving the injunction, when the \$143,000 was voted. I know that as much as \$375,000 of stock was voted on the question of consolidation. The whole amount of stock was near \$490,000. All the votes cast were for consolidation. The opponents declined voting. William McLaughlin and Newton Irving were the other judges of the election. La Q. Rawson voted the Oswald stock of \$143,000, on a written proxy produced to us. Mr. Rawson

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has been president of the consolidated road since that time. I do not know the amount of stock present that refused to vote. I think Oswald was not present at any of these meetings. Oswald's total stock was \$369,000. The application for injunction was aimed at \$303,000 of stock, and temporarily granted as to \$143,000; subsequently Rawson voted the whole \$369,000."

La Q. Rawson testified for the plaintiff: "I was the president of the plaintiff, and I identify her record."

The plaintiff then offered in evidence certain entries found therein. The defendants objected to the introduction of the same. The court overruled the objection, and permitted the entries to be read in evidence; to which ruling of the court the defendants, at the time, excepted.

The evidence thus introduced was, in substance, as follows:

At a meeting of the stockholders of The Lake Erie & Louisville R. R. Co., held in Findley, Ohio, on the 1st day of March, 1865, the following proceedings were had: Nine directors for said company were elected. A meeting of said directors was ordered to be held that day in Fremont, Ohio.

The oath of office was administered to six of said directors, to wit: La Q. Rawson, C. W. Foster, Squire Carlin, William H. Moore, William T. Ballinger, and R. W. B. McLellan.

At a meeting of the directors of the Lake Erie & Louisville R. R. Co. (present, the six above mentioned directors), held in Fremont, Ohio, on the 1st day of March, 1865, the following business was transacted:

La Q. Rawson was appointed President of this company; William H. Moore was appointed Vice President; R. W. B. McLellan was appointed Secretary and Treasurer; La Q. Rawson was appointed Superintendent; S. Medberry was appointed Chief Engineer; B. Amsden was appointed General Agent.

The offices of the company were located, and a seal of

the company adopted. The president and secretary were authorized to issue and deliver certificates of capital stock as provided in the articles of consolidation. They were also authorized to issue and deliver certificates of capital stock to subscribers to the capital stock of either of the constituent companies, who had not received the same, on filing with the secretary receipts of the treasurer of this company, or of the treasurer of either of the constituent companies, showing that said subscriptions had been paid in full.

The plaintiff then offered in evidence the deed of trust executed by the L. E. & P. R. R. Co. to George T. M. Davis and G. A. Robbins, dated March 31st, 1863, to secure 890 bonds, including the seventy bonds in controversy in this case, which said deed of trust is the same as heretofore set out as an exhibit to the complaint.

It is admitted that said 890 bonds are all in the hands of the trustees, except one, which is in the hands of Benjamin Smith, President of the Central Railroad.

The plaintiff then introduced in evidence the contract between James Oswald and The Lake Erie & Pacific R. R. Co., which contract is, in substance, as follows:

Said contract was entered into on the 23d day of December, 1861. For the consideration hereinafter mentioned, Oswald agrees to furnish all the material, and perform all the labor necessary to construct and finish a single track railroad from Rushville, Ind., to Union, Ind., with the necessary appendages, according to the specifications annexed; the work to be commenced within thirty days after notification to Oswald that the local subscription to the capital stock amounts, in the aggregate, to \$4,000 per mile, and that the right of way has been secured, and the work staked out, and at least two-thirds of the local subscription paid in; the road to be completed within two years from the commencement of the work, provided the bonds of the company can be judiciously negotiated—said bonds to be received in part payment of the work and used for the pur-

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chase of iron; the directors to extend said time, as they deem advisable. For the construction of said road, the L. E. & P. R. R. Co. agrees to pay said Oswald, per mile, as follows: \$16,000 in the first mortgage bonds of said company bearing seven per cent. interest, payable semi-annually; \$8,000 in the capital stock of said company; and \$3,500 in money; payments to be made monthly, according to the work done; the bonds stipulated to be given on this contract to be executed and deposited in some banking institution, together with this contract, as soon as practicable after the commencement of the work—said bonds to be held in trust by such third party, and to be used only in procuring iron. Upon the failure of payments, as above, Oswald can suspend or continue the work at his election, and is released from all liability to further prosecute the work, but the railroad company is not released thereby from any claims of damages Oswald may have by such suspension. No more than \$16,000 per mile of first mortgage bonds are to be issued on said road.

Specifications of said work are attached to the above contract.

The plaintiff introduced in evidence a release and cancellation of the contract above set out, which is, in substance, as follows: For value received, and upon a final settlement between the Lake Erie & Pacific R. R. Co., now the Lake Erie & Louisville R. R. Co., and the assignee of the executor of James Oswald, deceased, the foregoing contract is cancelled—full satisfaction and payment thereof acknowledged by said assignee. The railroad company is released from all liability on the same. The trustees named in the mortgage made by the L. E. & P. R. R. Co. are directed to surrender said bonds covered by said mortgage to said L. E. & L. R. R. Co., successors of the L. E. & P. R. R. Co., held by them in escrow. Said release is signed "A. B. Williams," and bears date, "Fremont, Ohio, April 11th, A. D. 1867."

The plaintiff then offered in evidence the proposition of James Oswald to the Lake E. & P. R. R. Co., dated Decem-

ber 11th, 1861, for the construction of said road. The foregoing contract is based upon said proposition.

A resolution, which was adopted, accepting the aforesaid Oswald proposition, signed by the Secretary of the company, then follows in the record.

The plaintiff then offered in evidence an entry in the Probate Order Book of the Fayette Common Pleas, made at the December term, 1867, as follows:

"Be it remembered that on this 9th day of December, 1867, J. P. Siddall, attorney for the Louisville & Lake Erie Railroad Co., filed in the clerk's office of the court of common pleas, an authenticated copy, with the proceedings thereon, of the last will and testament of James Oswald, late of the county of Welland, Canada, which reads, to wit:" The proceedings exhibited are the proceedings of the surrogate court of Welland county, admitting to probate the will of James Oswald, of the village of Stanford, county of Welland, and Province of Canada, and appointing John C. Fisher to administer upon the estate.

The will of James Oswald was exhibited as part of said proceedings. It is dated the 26th day of March, 1864, and was admitted to probate on the 28th day of March, 1866. The testator bequeathed all his property to his wife, Jane Oswald.

Attached to said proceedings are two certificates. Dexter D. Everand certifies, that he is register of the surrogate court of Welland county, "that the annexed is a true, full, and complete copy of the will of James Oswald, and of the probate thereof, as appears from said original will on file in my office, and from the records of said court, and I further certify that as such register I am clerk of said court, and have the legal custody of such will and probate thereof, and of the records of said court, and I further certify that Harvey Williams Price, Esq., is the judge of said court, and surrogate of said county."

Then follows the certificate of Harvey Williams Price.

"I, Harvey Williams Price, judge of her Majesty's surro-

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gate court, of the county of Welland, in the Province of Ontario, do hereby attest and certify that the above named Dexter D. Everand is the register and clerk of said court, and that I am judge thereof, and that the above certificate of the said register is made and signed by him and is authentic, and that as such register and clerk he has legal custody of said will and the probate thereof."

The order thus proceeds:

"And the court being satisfied that the instrument ought to be allowed as the last will of the deceased, ordered that the same be filed and recorded by the clerk of this court."

The appellants objected to the introduction of said evidence for the reasons, that it was irrelevant and incompetent; because the court had no jurisdiction of the subject matter of the order; and because there was no evidence that said Oswald was dead. But the court permitted said entry and exhibits to be read in evidence, and the appellants excepted.

The plaintiff then offered in evidence the record of the will of James Oswald and the probate thereof in Canada, as recorded in the record of wills of Fayette county, Indiana, the will and probate being the same heretofore referred to.

The appellants objected to the introduction of this evidence for the reasons, that it was irrelevant and incompetent; because it was improperly of record; and because there was no evidence of the death of James Oswald. The court overruled the objection, and the appellants excepted.

Alfred B. Williams testified for the plaintiff, as follows: "I was acquainted with James Oswald; he lived at Stanford, C. W., three or three and one-half miles from Suspension Bridge, in the county of Welland. I was at his house on the 26th or 27th of September, 1865, and saw him. I was there again on the 10th of May, 1866, and again on the 10th or 11th of July, 1866. When at his house in May, 1866, I saw Mrs. Oswald, but did not see him. I met John C. Fisher there."

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An agreement between John C. Fisher, as executor of Oswald, and the witness, was exhibited to the witness. The witness testified that he recognized the signature of Fisher, and saw him sign it.

The plaintiff then offered said agreement in evidence. The defendants objected to the introduction of the same for the following reasons: Because it was irrelevant and incompetent; because there was no evidence of Oswald's death, or that Fisher had power to make it.

The court overruled the objection, and permitted the agreement to be read in evidence. To the ruling of the court therein the defendants excepted.

Said agreement is, in substance, as follows: That on the 23d day of December, 1861, James Oswald entered into a contract with the Lake Erie & Pacific R. R. Co., to construct the road of said company, etc. Said contract referred to is the same as heretofore set out. That said contract was not wholly executed, but was suspended and discontinued; and that at the time of the death of said Oswald, there were certain rights and liabilities of the parties thereto growing out of said contract, which remain unsettled. That John C. Fisher, as said Oswald's executor, for the purpose of settling said estate, and for a valuable consideration paid, or agreed to be paid, by Alfred B. Williams, sets over and assigns to said Williams all rights and interests of said estate, legal or equitable, in said contract, including the certificates of stock in said company held by S. Medberry in trust under said contract. Said Williams indemnifies said estate against all claims that may be asserted against it by the Lake E. & P. R. R. Co., its successors, or others claiming under it. Said agreement is dated July 11th, 1866.

The plaintiff then offered in evidence an agreement between said A. B. Williams and the Lake Erie & Louisville R. R. Co., dated the 14th day of June, 1866. The defendants objected to the introduction of said evidence. The court overruled the objection, and to such ruling of the

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court the defendants excepted. Said agreement was then read in evidence, and is, in substance, as follows:

Said agreement was made on the 14th day of June, 1866, between the Lake Erie & Louisville R. R. Co., successors by consolidation of the Lake Erie & Pacific R. R. Co., of the first part, and Alfred B. Williams, of the second part. It is agreed that if said Williams becomes the assignee of said executor of said James Oswald, deceased, of the contract between said Oswald and the Lake Erie & Pacific R. R. Co. (which contract has been heretofore set out), he, the said Williams, will cancel said contract. In consideration of such cancellation, the party of the first part agrees to deliver to said Williams \$23,000, at par value, of the first mortgage bonds of said first party. And said first party also agrees to pay to said Williams, on proof to said first party of such before mentioned assignment to him, the said Williams, by the aforesaid executor, of said Oswald contract, the sum of \$1,750—the same to be applied in payment of the claims of said estate against said first party. Said first party also agrees to pay a certain judgment against said Oswald, amounting to about \$1,300. It is further agreed that \$369,950 of the capital stock of said Lake Erie & Pacific R. R. Co., now in the hands of S. Medberry in trust, shall be delivered by said Medberry to the said L. Q. Rawson.

Alfred B. Williams continued his testimony, as follows: "I am the same Williams mentioned in the contract with John C. Fisher."

An agreement, dated April 11th, 1867, endorsed on the contract between James Oswald and the Lake Erie & Pacific R. R. Co., purporting to be signed by this witness, was then exhibited to him, and he identified his signature. The plaintiff then offered in evidence the said agreement endorsed upon said contract. The defendants objected to the introduction of the same. The court overruled the objection, and the defendants excepted.

Said endorsement was then read in evidence, and is the

same heretofore set out. Said endorsement is a cancellation of the Oswald contract, and releases said company from all liabilities on account of the same.

A. B. Williams continued his testimony, as follows: The plaintiff asked the witness the following question: "State whether you have heard Davis or Robbins say anything about the surrender of the bonds." The defendants objected to the same, because it was irrelevant and incompetent, and because it was hearsay. The court overruled the objection, and permitted the witness to answer the question. The defendants excepted to the ruling of the court therein. The witness answered, that Davis refused to surrender the bonds or cancel the mortgage.

The defendants then offered to prove by said Williams, that all the moneys used by him in his expenses to Canada and return, in the negotiations and consummation of the contract with Fisher, were the moneys of others, to wit, Dillard Ricketts and Benjamin Smith. The plaintiff objected to the introduction of said evidence, and the court sustained the objection. To said ruling of the court the defendants excepted.

The defendants also offered to prove by said Williams, that in his negotiations with said Fisher in and about said contract and assignment (heretofore set out), he was acting as the agent of D. Ricketts, President of the Jeffersonville R. R. Co., and Benjamin Smith, President of the Indiana Central R. R. Co., and that he had no interest in the same, but all benefits arising therefrom were for said Ricketts and Smith. The plaintiff objected to the introduction of said evidence, and the court sustained the objection. To which ruling of the court the defendants excepted.

La Q. Rawson testified, for the plaintiff: "I talked with Paine and Webb, two of the defendants herein, in New York, before this suit was commenced. They were speaking about these seventy bonds, and said they had some interest in them, and wanted to know when they were going to be got out, and why they had not been got out before."

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The plaintiff then offered in evidence an order of the directors of the Lake Erie & Louisville R. R. Co., authorizing the issue of two mortgages, dated August 14th, 1866. The defendants objected to the same. The court overruled the objection, and permitted the order to be read in evidence. To the ruling of the court therein the defendants excepted.

The evidence thus introduced is, in substance, as follows: By order of the board of directors of the Lake Erie & Louisville R. R. Co., for the purpose of finishing the portion of said road lying between Cambridge City, Ind., and Rushville, Ind., an issue of 400 bonds of this company, of \$1,000 each, payable in the year 1900, bearing seven per cent. interest, payable semi-annually, was authorized; said bonds to be secured by mortgage, or deed of trust, upon the aforesaid portion of the road of this company. It was also resolved by said board, for the purpose of finishing that part of said road between Cambridge City, Ind., and Union City, Ind., to issue 700 bonds of said company, of \$1,000 each, payable in the year 1900, bearing seven per cent. interest, payable semi-annually; said bonds to be secured by mortgage, or deed of trust, upon said part of the road lying between Cambridge City, Ind., and Union City, Ind.

The plaintiff then introduced in evidence part of the mortgage record of Fayette county, the same being the record of a deed of trust by the Lake E. & L. R. R. Co. to Geo. T. M. Davis, dated September 25th, 1866, which mortgage, or deed of trust, contains the usual provisions of such instruments, and was executed on the 25th day of September, 1866, by the Lake E. & L. R. R. Co. to George T. M. Davis, of New York, as trustee for the bondholders. It mortgages the road, franchises, etc., of said company extending from Cambridge City, Ind., to Rushville, Ind., etc., to secure the payment of four hundred bonds, of \$1,000 each, payable on the 1st of January, 1900, in New York, with seven per cent. interest per annum, payable semi-an-

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nually. This instrument was duly executed by the parties thereto, and recorded.

La Q. Rawson testified for the plaintiff, as follows: "The bonds authorized by the orders, and the two mortgages mentioned therein, were executed, and forwarded to the trustee, George T. M. Davis, at New York. One of these mortgages is the one already introduced. We did not send as many bonds to Davis as the orders authorized. I sent \$400,000 or \$500,000. I sent the bonds by express, and received Mr. Davis' receipt."

A. B. Williams testified for the plaintiff, as follows: "I saw bonds in the possession of Davis, in New York, purporting to be issued by the Lake Erie & Louisville R. R. Co. This was in August last."

La Q. Rawson testified for the defendants, as follows: The defendants proposed to prove by said witness, that one of the bonds secured by the mortgage exhibited in the complaint is outstanding in the hands of the party to whom negotiated—a person not a party to this suit, who held the same when this suit was brought, with full notice of the facts connected with the Oswald contract and the defendants' rights under it; and that the plaintiff knew in whose hands said bond was at the time this suit was brought.

The plaintiff objected to the introduction of said evidence. The court sustained the objection, and the defendants excepted to the ruling of the court therein.

The said witness then identified the First Annual Report of the plaintiff to her stockholders, being a printed pamphlet issued to said stockholders about the 7th of March, 1866. The defendants then offered in evidence certain portions of said report. The plaintiff objected to the introduction of the same, and the court sustained the objection. To the ruling of the court therein the defendants excepted.

The evidence thus offered, and excluded, is as follows:

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"First Annual Report of the Lake Erie & Louisville R. R. Co., to the Stockholders, March 7th, 1866.

The Lake Erie & Pacific Railroad Company, as above, was organized under the general railroad law of Indiana, and a contract was made for furnishing all the material and building complete the entire road, to be paid for, a part in cash, a part in the capital stock, and a part in first mortgage seven per cent. bonds of the company.

In accordance with this arrangement, a mortgage and 890 bonds of \$1,000 each were executed and placed in the hands of trustees in the city of New York, there to remain until called for by a joint order of both parties to the contract, in accordance to the provisions thereof. Those provisions of the contract having never been fully complied with, the bonds still remain in the hands of said trustees, excepting one, which has been sold and is now outstanding.

The work under this contract was suspended in the spring of 1864.

* * * * *

This line of road was, in the fall of that year, placed under contract, and the work of grading, furnishing ties, and preparing for laying the track continued to go forward until a large majority of the work in preparing the road bed for the iron had been accomplished, and until the extremely high prices of labor and materials of all kinds rendered a suspension of the work necessary, in the summer of 1864, since which time it has remained in suspense.

In furtherance of the original design of making this a great through line of road from Fremont to Louisville, Ky., via the Jeffersonville railroad, and thereby perfecting a communication on the shortest and best line for the interchange of the business of all that region of country at and south of Louisville and along the Ohio river, with Indiana, Ohio, and the eastern markets, the stock, franchises, etc., of the Fremont, Lima & Union Railroad Co., formerly known as the Fremont & Indiana Railroad Co., has been consolidated with that of the Lake Erie & Pacific Railroad Co.

This consolidation was confirmed by a vote of the stockholders of both companies, in January last, thus making it all one road from Fremont, Ohio, to Rushville, Ind., about 175 miles in length.

At Rushville, your road will connect with a branch of the Jeffersonville road *via* Shelbyville to Columbus, thence over the Jeffersonville road proper to Jeffersonville, Indiana, 112 miles, making the whole distance from Fremont to Jeffersonville 287 miles, over a road which, for beauty of alignment and easy grades, is probably not equaled by any road of similar length in the western country.

This makes a much shorter and better connection between the Falls of the Ohio, at Louisville, and the navigable waters of Lake Erie, than can be had by any other line. * * * * * * *

The board of directors now propose to issue bonds which shall be secured by a first mortgage on the whole road, of an amount sufficient, in addition to the aid to be obtained along the line, to complete and equip it, and retire the present outstanding bonds, which are to be taken up and canceled, in exchange for a like number of the new issue. From the progress already made, looking to the negotiation of these bonds, it is confidently believed that we shall soon be able to dispose of a sufficient amount of them to justify the resumption of work on the line.

"L. Q. RAWSON,
"President.

"FREMONT, March 7th, 1866."

The defendants then proved the execution of, and offered in evidence, a contract between James Oswald and the defendants Paine, Fay, Webb, and Geo. P. Eddy. The plaintiff objected. The court sustained the objection, and the defendants excepted.

The contract thus offered in evidence, and rejected, is hereinbefore set for as "Exhibit No. 1," of the answer (*ante*, p. 299).

The defendants then identified the record of the Lake E.

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& P. R. R. Co., and offered in evidence certain entries found therein. The plaintiff objected to the introduction of the same, and the court sustained the objection. The defendants excepted to the ruling.

The evidence thus excluded is, in substance, as follows: That at a meeting of the board of directors of the Lake Erie & Pacific R. R. Co., convened at Suspension Bridge, N. Y., on the 14th day of November, 1864, it was resolved to accept the proposition of James Oswald to cancel his contract with said road. Said proposition is dated November 14th, 1864, and the same has heretofore been set out.

It was also resolved to consolidate said road with the F., L. & U. R. R. Co., upon the terms of a paper made this day, subject to the ratification of the stockholders. Said contract of consolidation is then set out upon the records of said company, and is the same as the contract of consolidation heretofore set out, except that it recites, that the basis of consolidation and stock representation of each of the constituent companies shall be \$470,000 to the Lake E. & P. R. R. Co., and \$900,000 to the F., L. & U. R. R. Co.; and in case that the stock now issued by each of said companies is less than the amount of each as above stated, an additional amount or per cent. of stock shall be issued to the present stockholders in each of said companies, to make it equal to the amount above mentioned for each road. The present stock of said companies is to be surrendered, and consolidated stock to be given in lieu thereof, when the consolidation is perfected. Said contract is signed by

GEO. P. EDDY, D. WEBB, N. E. PAINE, JOHN D. FAY,
Directors of the L. E. & P. R. R. Co.
R. JENNINGS,

Sec'y L. E. & P. R. R. Co.

LA. Q. RAWSON, S. CARLIN, C. W. FOSTER, D. J. CORY,
JAMES MOORE, R. W. B. McLELLAN,

Directors of the F. L. & U. R. R. Co.

R. W. B. McLELLAN,

Sec'y F. L. & U. R. R. Co.

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It was also resolved to deliver to James Oswald an order addressed to Messrs. Davis and Robbins, trustees, etc. The same has been heretofore set out in full as Ex. No. 5. It was also resolved to convene a meeting of the stockholders of said company, to consider said contract of consolidation, at Cambridge City, Ind., on the 4th day of January, 1865; and the Secretary was directed to notify the stockholders of the same.

The defendants then offered in evidence certain other entries in the record of the Lake E. & P. R. R. Co. The plaintiff objected to the introduction of the same, the court sustained the objection, and the defendants excepted.

The evidence thus offered and excluded was, in substance, as follows:

At a meeting of the board of directors of the Lake E. & P. R. R. Co., held at Cambridge City, Ind., Dec. 6th, 1864, the proceedings of said board had at Suspension Bridge, N. Y., November 14th, 1864, as above, were approved and confirmed, and the contract of consolidation there entered into was ratified, confirmed, and adopted. It was also resolved to submit said consolidation contract to the stockholders of said company at a meeting thereof, to be called for that purpose, to be held in Cambridge City, Indiana, January 18th, 1865. It was also resolved that all proceedings had at Suspension Bridge, N. Y., on the 14th day of November, 1864, not heretofore referred to, relating to the Oswald contract, so called, or otherwise, be and are fully confirmed and adopted.

On motion of the plaintiff, various parts of the defendants' depositions were suppressed. The defendants excepted to the rulings of the court therein.

The defendants then read in evidence the unsuppressed portions of the deposition of Nicholas E. Paine, as follows:—

* * * "Soon after this, a company was organized for the construction of the same, known as the Lake Erie-

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& Pacific Railroad Company, with seven directors, who were, as well as I now remember, L. Q. Rawson, of Ohio; George P. Eddy, John D. Fay, and myself, of the State of New York; Alexander White, R. Rush, and Dr. Sexton, Sen., of the State of Indiana; * * * and said Rawson was requested to retire from the presidency and directorship of the L. E. & P. R. R. Co., which he thereafter did, and said Eddy was chosen in his place. * * *

This meeting at Cleveland was adjourned to the Suspension Bridge, where said Oswald, Eddy, Fay, Rawson, and his engineer, S. Medberry, and myself, met for the purpose of considering further the question of consolidation. This was about the 14th of November, 1864. Mr. Rawson then claimed to represent the Fremont, Lima & Union road, and Medberry was present as his adviser. Mr. Rawson then distinctly and intimately knew the precise condition of the Lake Erie & Pacific road, the number of ties it owned, the extent of its grading, and the amount, as near as could be stated by Mr. Webb, of the floating debt, and also the state of its bonds and stock. He knew of the amount of local subscriptions that were unpaid, and what was conditional, and what unconditional, there being much more of these subscriptions, as well as I now remember, which were considered good, than the supposed amount of the floating debts. Said Rawson also then knew clearly, distinctly, positively, and in detail, and had done so from time to time, from the beginning, the precise relations of Eddy, Fay, Webb, Oswald, and myself, in the Oswald contract as above stated. There was no concealment from him in any respect in reference thereto, nor from any one else who made inquiry. The whole state of the case was familiar to him as to myself, or either of the directors. Under this state of facts we opened the negotiations for consolidation, and stated to said Rawson what proposition Oswald would probably make to his board of directors (which was considered a matter of mere form), as the contractor of record. * * * There is a writing to that

effect with Rawson and a Mr. Fisher, the executor of Oswald, a copy of which is annexed hereto, marked 'A,' *

* * but I had no knowledge of this until after the contract was closed, nor had Fay or Webb, as I believe. Afterwards, and before the stockholders of either of the roads had voted upon the question of consolidation, thus incipiently begun at the Bridge, as aforesaid, it was adjudged necessary to legalize the proceedings as to said consolidation, thus commenced at said Bridge, in the State of Indiana; and the said Fay, Eddy, Webb, and myself, as directors, went to Cambridge City, and there met Rawson and others of the board of the Lake Erie & Pacific road, with several of its stockholders, among whom was Alfred B. Williams, and the proceedings at the Bridge were then and there confirmed by resolution of the board, and I then and there, in a statement before the board and said stockholders, and said Williams, rehearsed the transaction at the Bridge as to the \$70,000 bonds, and the interest therein of Webb, Fay, Eddy, and myself, with said Oswald, and the fact that Oswald was to pay what of them might be due to Davis, Robbins, and said Wadsworth, to the end that there should be no want of knowledge in reference thereto before a final action was had upon the question of consolidation. My object in this regard was to give full notice of my interest in said bonds, and how that interest arose, so that all hearing might act accordingly. Such proceedings were thereafter had, as I am informed and believe to be true, that the said roads were consolidated, and assumed the name of the "Lake Erie & Louisville Railroad Company," since which time I have had no connection with the roads whatever. * * * I do not remember, and do not believe, that I ever exchanged even a word upon the subject of said consolidation with any party interested in the said Fremont, Lima & Union road, or with either of its directors, except as aforesaid with Rawson and Medberry. With no other party out of the officers of the road would I have entertained the subject at all."

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The exhibit filed with Paine's deposition is the agreement between James Oswald and La Q. Rawson, dated Nov. 14th, 1864, and is the same as set out in Ex. No. 3.

The defendants then read in evidence the unsuppressed portions of the deposition of John D. Fay, as follows:

"In December following, a board of seven directors were appointed, three of whom were in Indiana, La Q. Rawson in Ohio, and the other three, N. E. Paine, George P. Eddy, and myself in New York. L. Q. Rawson was made president of the company, D. Webb superintendant, and myself chief engineer. We directed the route to be surveyed and estimated, and maps, and plans, and profiles of the line to be made, which were done, and the line prepared for letting the work; all which was done under my direction as chief engineer. I also prepared the specifications in detail as to the manner in which the work was to be done. * *

* Mr. Oswald continued the work, grading, in amount, about fifty miles of the line, and procured a large portion of the ties for the road, when the company ran short of means, and the work was stopped. In the meantime, efforts were made to get the money necessary to complete the road. Several interviews were had in New York City with Messrs. Bright and Ricketts, and two or three other parties, but without any definite result. * * * Mr. Rawson understood the relations existing between Oswald, Eddy, Webb, Paine, and myself, before, and during the pendency of said negotiations; and said Col. Paine, at a meeting of the directors at Cambridge City, Ind., to confirm the acts of the board at Suspension Bridge, stated to the board, at which Mr. Mercer, Director Williams, and other stockholders were present, the particulars in regard to the 70 bonds, and our relations and connections therewith."

The defendants then read in evidence the unsuppressed portions of the deposition of George P. Eddy, as follows:

* * * "I was one of the directors of the Lake Erie & Pacific R. R. Co., at the time of its organization, and

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remained so up to the time of its consolidation with the Fremont, L. & U. R. R. Co. I was some three years president of the Lake Erie & Pacific R. R. Co. and conversant, as I believe, with all the prominent features of the letting of the road to James Oswald, and of the work done under said contract, and with the history of its consolidation. * * * Mr. Oswald visited said line of road, and made a proposition to the directors at a meeting of the directors held at Cambridge City, on or about the 10th of December, 1861, at which were present, Allen Lewis, J. P. White, John D. Fay, and myself, said Lewis and White being directors of Indiana, and said Fay and myself of New York—no other directors of the board were present, or participated in said letting. The said contract was executed by L. Q. Rawson, president of the Lake E. & P., and the then said president of the Fremont & Indiana road. * * *

After said Rawson had remained President of said Lake E. & P. R. R. for a short time, he was induced to resign, and I was elected in his place, and remained the president of the road up to or near the time of its consolidation with the Fremont, Lima & Union R. R. * * * But said \$70,000 of bonds have not been delivered, nor has said floating debt been paid, as I am informed and believe. At the time of said agreement at said Bridge, as to said consolidation as aforesaid, the said Rawson fully understood, definitely, and positively, the precise relations of Fay, Paine, Webb, and myself, with said Oswald in said contract; that we were to have, and receive, equally, the results of said 70 bonds. As to this I am positive, and that he had known such relation from the time it begun to the time of said agreement with said Oswald; * * * and the said Paine (said Rawson, Williams, and others being present) stated fully the relations of said Fay, Webb, himself, and myself, in the Oswald contract, and the terms of said consolidation, so far as said 70 bonds were concerned, and the payment of said floating debt, and how our interests arose in said contract,

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and that our interest in said bonds was each equal with the interest of said Oswald, and that out of them said Oswald had to quiet the legal rights of the trustees, Davis and Robbins, and said Wadsworth; * * * said Williams also paid me the amount of money I had advanced in the way of expenses, while acting as director and president of said company."

The defendants then read in evidence the portions of the deposition of Dwight Webb' not suppressed, as follows:

* * * "I should here state, by way of showing the relation of L. Q. Rawson to this line of proposed road, that he had some two years before caused to be organized a railroad company for the same object, and was for a time the president of such company. * * * I was elected director of the company December 7th, 1863, or about that time, and was such at the time of the meeting at Cleveland, and all subsequent meetings, and voted on the adoption of the articles of consolidation, and on the resolutions to accept the proposition of James Oswald as before stated."

The defendants having read in evidence such portions of the depositions of Paine, Fay, Eddy, and Webb, as had not been suppressed, excepting that portion of the deposition of N. E. Paine, as follows: "Said Oswald has deceased, and after his decease, as I am," the court directed, over the objection of the defendants, the same to be read in evidence. To this the defendants excepted. The defendants had read in evidence all of said deposition not suppressed, except the line above quoted, without condition, or exception, then, that being omitted, the court, as above, required the same to be read in evidence.

Alfred B. Williams testified for the plaintiff, as follows:

"I was not present, December 6th, 1864, at a meeting of the directors of the Lake E. & P. R. R. Co., at Cambridge City."

N. H. Johnson testified for the plaintiff, as follows:

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"I was present, December 6th, 1864, at a meeting of the directors of the Lake E. & P. R. R. Co., at Cambridge City. Paine, Eddy, and Webb were present."

The court, of its own motion, charged the jury as follows:—

"GENTLEMEN OF THE JURY, In this case the Lake Erie & Louisville R. R. Co. have brought suit against Thomas Wadsworth, Nicholas E. Paine, George P. Eddy, John D. Fay, Dwight Webb, George T. M. Davis, George A. Robbins, John C. Fisher, Ex., etc., of James Oswald, deceased, Alfred B. Williams, and the Lake Erie & Pacific R. R. Co. Wadsworth, Eddy, Davis, Robbins, Fisher, Williams, and the Lake E. & P. R. R. Co., have been defaulted.

Nicholas E. Paine, John D. Fay, and Dwight Webb appear and defend, and it is the issues joined between the plaintiff and these three defendants you are to try and determine.

Those issues are, briefly, as follows: The plaintiff alleges, that the Lake Erie & Pacific R. R. Co. organized in the State of Indiana, in October, 1860; that afterwards they executed 890 bonds of \$1,000 each, and at the same time executed a mortgage, or deed of trust, to said George T. M. Davis and George A. Robbins, as trustees, to secure the payment of said bonds, and that said bonds were afterwards delivered to said trustees, to be by them sold on the orders of said company. The plaintiff further alleges that the Fremont, Lima & Union R. R. Co. became organized as a corporation of the State of Ohio in January, 1862, and that afterwards said company and the Lake Erie & Pacific R. R. Co. consolidated, and became one corporation, and one railroad company, by the name of the Lake Erie & Louisville R. R. Co., the plaintiff in this suit; that afterwards said plaintiff, prior to the commencement of this suit, demanded of said trustees a delivery and cancellation of said bonds and the satisfaction of said mortgage.

The plaintiff further alleges, that said defendants, Paine,

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Fay, and Webb, claimed to have an interest in said 70 of said 890 bonds, and that such claim of interest prevents the cancellation of said bonds and mortgage.

To the complaint of the plaintiff, Paine, Fay, and Webb put in a general denial, denying all the allegations of the complaint.

The instructions will be given with reference to seven interrogatories, which you are required to answer.

The first interrogatory is as follows:

1st. Was there such an organization as the Lake Erie & Pacific R. R. Co. in the State of Indiana?

2d. Did said railroad company execute 890 \$1,000 mortgage bonds, and execute a mortgage on the line of their road to secure the payment of the same?

3d. In whose hands were these bonds placed, and in whose hands are they now?

4th. How many of these bonds have been negotiated and sold?

5th. Did the defendants Nicholas E. Paine, John D. Fay, and Dwight Webb, ever, prior to the commencement of this suit, claim an interest in said bonds?

6th. Was there such an organization in the State of Ohio as the Fremont, Lima & Union R. R. Co.?

7th. Did the Lake Erie & Pacific R. R. Co. and the Fremont, Lima & Union R. R. Co. consolidate, and form one company, called the Lake Erie & Louisville R. R. Co., prior to the commencement of this suit?

If a copy of the articles of association of the Lake Erie & Pacific R. R. Co. are testified to be so by the Secretary of State, this affords presumptive evidence that it is an incorporated company, and if there is no evidence showing that it was not an incorporated company, you will be warranted in answering this interrogatory in the affirmative.

If you are satisfied that Paine, Fay, and Webb were directors of said company, and acted as such, they can not now deny that it had been incorporated and organized.

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As to the 2d, 3d, and 4th interrogatories, the evidence is before you, and requires no explanations or charges.

The 5th interrogatory reads as follows:

Did the defendants Nicholas E. Paine, John D. Fay, and Dwight Webb, ever, prior to the commencement of this suit, claim an interest in said bonds?

In answering this interrogatory you are not to determine whether Paine, Fay, and Webb had an interest in the 890 bonds, or any part of them, but merely whether or not they asserted that they had an interest.

The 6th interrogatory is as follows:

Was there such an organization in the State of Ohio as the Fremont, Lima & Union R. R. Co.?

The incorporation of the Fremont, Lima & Union R. R. Co. may be proved by a copy of its articles of association properly certified by the Secretary of State of the State of Ohio, and properly authenticated. I have admitted such copy in evidence. If there is no evidence contradicting such incorporation, you are warranted in answering said interrogatory in the affirmative.

The 7th interrogatory is as follows:

Did the Lake Erie & Pacific R. R. Co. and the Fremont, Lima & Union R. R. Co. consolidate, and form one company, called the Lake Erie & Louisville R. R. Co., prior to the commencement of this suit?

The consolidation of the Lake Erie & Pacific R. R. Co. and the Fremont, Lima & Union R. R. Co. must be proved to have been done according to the laws of the State of Ohio; that law and the evidence is before you."

To the giving of said instructions, and each of them, in charge to the jury, and to the propounding of said interrogatories, and each of them, to the jury, the defendants objected and excepted.

The jury, without returning a general verdict, returned the following answers to the interrogatories propounded by the court, to wit:

To the 1st interrogatory, "yes;" to the 2d interrogatory,

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"yes;" to the 3d interrogatory, "in the hands of the defendants Davis and Robbins, except one bond;" to the 4th interrogatory, "one bond;" to the 5th interrogatory, "the defendants Paine and Webb did;" to the 6th interrogatory, "yes;" to the 7th interrogatory, "yes."

To the reception of the answers to said interrogatories so returned by the jury, and to the reception of each of them, the defendants excepted.

The defendants moved for a new trial, and filed written reasons therefor. The court overruled said motion, and the defendants excepted.

The court then rendered the following final judgment and decree in said cause, based upon the answers returned by the jury to the interrogatories propounded by the court, to wit:

"It is therefore ordered, adjudged, and decreed by the court, that 889 of the bonds and coupons of the Lake Erie & Pacific R. R. Co., and referred to in complaint, be delivered by the said defendants Davis and Robbins, the trustees of said mortgage given as security for the payment thereof, to the plaintiff, to be canceled, and that the same are hereby canceled, and declared null and void, and that \$23,000, at the par value thereof, of the bonds of the plaintiff secured by said mortgage on the line of its road between Union and Cambridge City be delivered by the said trustee, George T. M. Davis, the grantee of said mortgage, to the defendant Williams as soon as said first original mortgage is canceled and satisfied. That the claim asserted by the defendants Paine, Eddy, Fay, and Webb, to an interest in any part of said bonds described and referred to in said complaint, is invalid and void. That the plaintiff, upon the surrender of all of said bonds by the defendants Davis and Robbins, pay to them the sum of \$5,750. That the plaintiff recover of the defendants, except the defendant Fay, their costs in this suit laid out and expended, and that said defendant Fay recover of plaintiff his costs laid out and expended in this suit."

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To the rendition of which said judgment and decree, the defendants then and there, both as to its substance and form, objected and excepted.

The questions presented are saved by proper bills of exceptions.

GREGORY, J.—The portions of the depositions which were suppressed only tended to prove the matters set up in the special answer and cross complaint, to which a demurrer was sustained. In our view of the case, it is not necessary to notice them more specifically.

The first question presented is, did the court below err in refusing to transfer the case to the circuit court?

The statute provides, that "when it appears upon the face of the complaint or by other legitimate pleadings verified by affidavit, that the title to real estate is in issue in the common pleas court of any county, the cause, with the papers, and a transcript of the entries of record shall be transferred to the circuit court of the same county." 2 G. & H. 22, sec. 11.

The main object of the complaint was to have satisfaction entered of a mortgage; this might or might not involve the title to real estate; it therefore did not appear on the face of the complaint that the title to real estate was in issue. There was no issue until answer, and that answer might, or might not, put in issue the title to the mortgage premises; and unless the answer was verified by affidavit, it was not the duty of the common pleas court to transfer the case to the circuit court.

The true rule on this subject is stated in *Carpenter v. Vanscotten*, 20 Ind. 50.

The court below committed no error in refusing to certify the case to the circuit court.

Did the court below err in overruling the demurrer to the complaint?

A very grave question is presented in the argument as to the power of two states to create one corporation. It is

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claimed, that to maintain this action the consolidation must have resulted in the formation of one company, and that this is simply impossible. It is urged, that it might with as much propriety be argued that a child can have two mothers, as that two states can create one corporation. Under our view of the case, this question becomes of no importance. It is admitted by the counsel for the appellants that the effect of the consolidation might be to create two corporations, with the same name and stockholders, a unity of stock and interest. This suit, in our judgment, can well be maintained under either view. If there is but one corporation as the result of the consolidation, then the suit is undoubtedly well brought; if there are two corporations, then all the parties necessary for a complete settlement of the matter in dispute are before the court. The facts set out in the complaint show that both corporations are before the court.

It is assumed in argument by the counsel for the appellants, that the grounds of relief against the defendants are both constructive and actual fraud, and it is urged that the appellee is not in a condition to take advantage of the fraud.

The relief sought by the plaintiff is based upon a compromise and settlement between the assignee of Oswald's executor and the railroad company, for and on account of the original contract, treating the intermediate steps as offering no impediment to such a compromise and settlement. To enable Oswald's executor or his assignee to make such a settlement, there was nothing to rescind. It could hardly be contended that the appellants, under the facts averred in the complaint, could have a standing in court to entitle them to object to the consummation of such a settlement.

The complaint shows that the sub-contractors were paid out of the means of the railroad company; that the seventy bonds to which Oswald was to be entitled, by the arrangement made at the "Suspension Bridge," was profit, in which the appellants were to share. Such an arrangement made by the directors of a railroad company could only be

confirmed by the action of the stockholders, and not by the directors of whom the guilty parties formed a part.

It is clear to our minds, that the new company succeeded to the rights of the old corporations. The new was composed of the elements of the old; it was the same under a new form. It is only a play upon words to say, that phoenix-like the new arose from the ashes of the old. There was no turning to ashes necessary in the process. It only required a commingling of the elements of which the old was composed. The new assumed the liabilities and succeeded to the rights of the old.

The next inquiry is, did the court err in its rulings on the demurrers to the answers?

1. The proposed contract of Oswald with the company, dated November 14th, 1864, at Suspension Bridge, never contemplated that seventy of these bonds should be delivered to him, but only that he should receive seventy bonds of the consolidated company. This written proposition is made a part of the answer. In his proposal of the above date, Oswald says: "I will cancel and abrogate my said contract upon your giving me seventy of the first mortgage coupon bonds of your said company of \$1,000 each, which bonds are to be exchanged for a like number, kind, and amount of bonds of the consolidated company, in the time and manner hereinafter specified. You to give an order upon said trustees for the balance of said bonds, 820 in number, and also for the bonds, seventy in number, which I am to have under this proposition; but all of said bonds shall be and remain in the hands of said trustees until the bonds of the consolidated company are issued and ready for delivery, as hereinafter stated; when said trustees shall cancel and exchange seventy of said bonds for a like number, kind, and amount of said consolidated bonds, which said consolidated bonds they are to hold for the benefit of, and to be delivered to, Mr. James Oswald, when called for by him. The bonds of the consolidated company to be issued

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and exchanged for the present bonds within six months from the date hereof."

On the same day and at the same place of the above proposal of Oswald, an agreement was entered into between him and Rawson, in which the seventy bonds are referred to, as follows: "Second, And until seventy of the first mortgage bonds of the consolidated company of the Fremont, Lima & Union Railroad Company and the Lake Erie & Pacific Railroad Company are delivered by said Rawson, or some agent of the consolidated company, to the trustees named in the bonds of the Lake Erie & Pacific Railroad Company, subject to the order of said Oswald," &c. This agreement is also part of the answer.

The foregoing extracts show that none of these bonds, now in controversy, were ever to be delivered to Oswald, and, therefore, that these defendants could not have any interest in them.

2. The proposition of Oswald was conditional, that "I will cancel and abrogate my contract, upon," &c. The cancellation depended upon compliance with the terms of the proposition, and within six months of the time specified therein. The proposition of Oswald says:

"I beg leave to make the following proposals:

"1st. I will cancel and abrogate my said contract upon your giving me seventy of the first mortgage coupon bonds, &c.

"2d. The company to pay its floating debt—I pay all liabilities I have incurred since the 1st day of October last.

"3d. I will settle and pay the trustees of said bonds, G. S. Robbins and Geo. T. M. Davis, and will settle and pay the Hon. James Wadsworth for his services."

The fourth proposal relates to the seventy bonds.

"5th. The bonds of the consolidated company to be issued and exchanged for the present bonds within six months from the date hereof.

"6th. You to issue to me the amount of stock subscribed

by me, and now due me as a cash payment upon my said contract, for work already done."

The above proposition of Oswald only offers to cancel upon compliance with the six conditions stated in it, and not until they are complied with.

The language of the proposition is, "I will cancel and abrogate my said contract, upon" compliance with the six following stipulations. Even an unconditional acceptance of the proposition by the company would not have the effect to cancel the original contract until all the terms of the proposition had been carried out. Some of the conditions of the proposition are to be performed by Oswald, and others by the company, and not until all these conditions are complete would the original contract be affected in any way whatever.

3. The acceptance of the proposition of Oswald by the company was conditional. It is as follows:

"On motion of John D. Fay, seconded by D. Webb, the following resolution was unanimously adopted:

Resolved, That the proposition of James Oswald, submitted to this board, and which is hereinafter set forth, by which he rescinds and cancels his contract for the construction of the Lake Erie & Pacific Railroad, be, and the same is hereby, accepted, with all its terms and conditions; and said contract is hereby declared void and of no further effect: *provided*, the floating debt is paid off by L. Q. Rawson, of Ohio, and the bonds delivered as per agreement between said Oswald and L. Q. Rawson, on this 14th day of November, 1864."

This acceptance, being conditional, and not unqualified, amounts to nothing, unless Oswald had assented to its conditions. The proposition of Oswald, thus accepted, does not even amount to a contract to rescind the original contract, much less to a rescission of it. Even the unqualified acceptance by the company of the proposition would only create an agreement to rescind whenever the conditions of the agreement were fulfilled by both parties. But an ac-

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ceptance with new conditions appended to it is, in legal effect, a rejection by the company of the proposition. The proposition of Oswald, in the second stipulation, says:

"You (the company) to pay the floating debt of said company."

The acceptance of the proposition by the company says: "*Provided*, the floating debt is paid off by L. Q. Rawson, of Ohio."

Now, the proposition of Oswald requires that the company shall not only agree to pay off its floating debt, but shall actually pay it before cancellation.

The so-called acceptance of this proposition by the company not only refuses to bind the company to pay off this floating debt, or to cancel it, but actually insists that it shall be paid by L. Q. Rawson, of Ohio.

In the pretended acceptance by the company, of the proposition of Oswald, it is also made a proviso or condition of the acceptance, that the "floating debt is paid off by L. Q. Rawson, of Ohio, and the bonds delivered, as per agreement between said Oswald and L. Q. Rawson, on this 14th day November, 1864."

The foregoing proposition and acceptance is the sole and entire contract under which Oswald could claim any interest in the bonds in controversy, and under which the defendants claim, by virtue of their agreement with Oswald. If there was no contract under which Oswald might claim an interest, of course these defendants could claim none.

The answers are also defective, in not showing a compliance with Oswald's contract to pay the trustees and Wadsworth for their services.

But independent of all this, the appellants do not show themselves entitled to any equitable relief. They do not show a compliance on their part with any of the terms of their contract with Oswald by which they were to share in the profits of the contract with the railroad company.

Under the agreement between Oswald and the appellants, the latter are only entitled to a share of the net profits.

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They are not joint owners with Oswald, or interested in the specific things received by him in payment for work done under his contract. He, only, is entitled to receive the compensation, and when he has liquidated all the expenses incurred in the prosecution of the work, and thus ascertained what, if any, the net profits are, and not until then, in the absence of bad faith, can the appellants prefer any claim. See *Chase, Ad'r, v. Barrett*, 4 Paige Ch. 148.

It is clear to our minds, that the appellants, being directors in the railroad company, could not acquire such an interest in the profits of a contract for the construction of the road as would give them a standing in a court of equity, to interpose an objection to the consummation of a compromise between the railroad company and its contractor. Their relations to the company forbade such an agreement; at least, a court of equity would not interpose to enforce such an agreement against the interest of the company.

The court below committed no error in sustaining the demurrers to the answers.

The complaint sought no relief against the appellants. They were made parties to answer as to their pretended interest in the subject matter of the suit. In such a case, an affirmative answer is necessary if relief is sought. The general denial by such a party puts the plaintiff to such proof as would place the defendants in the wrong. They could have disclaimed any interest, and thus have saved themselves from costs. There being no answer entitling the defendants to affirmative relief, the court committed no available error in suppressing portions of the depositions of the appellants.

It is claimed, that the court below erred in admitting Swan & Critchfield's edition of the Ohio statutes in evidence.

The title page, in our judgment, shows that it was printed under the authority of the State of Ohio. It was "published for the State of Ohio, and distributed to its officers;".

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under the act of the General Assembly." How could it be published under an act of the General Assembly, for the State of Ohio, unless it was published by authority? Ohio could only speak through her laws. It could not have been published for the State unless a law authorized it. An unauthorized publication could not be a publication for the State. We think the court committed no error in admitting the statute.

It is claimed, that the statute of Ohio ought to have been pleaded. This is never required where the statute constitutes a part of the organization of a corporation suing. Any other rule would tend to great prolixity in pleading.

The court committed no error in admitting in evidence the articles of association of the Fremont, Lima & Union Railroad Company. They were duly certified as required by the law under which the company was organized.

The sworn and certified copy of the articles of consolidation between the Lake Erie & Pacific Railroad Company and the Fremont, Lima & Union Railroad Company, from the office of the Secretary of State of Ohio, was properly admitted in evidence. 2 G. & H. 184, sec. 284.

The court committed no error in excluding the evidence offered by the appellants. There was no issue to which it was applicable.

The verdict embraced everything that was necessary on the issue between the plaintiff and the appellants. The equitable rights of the appellants were not before the court under the issue made.

The answers to the interrogatories could stand as a special verdict.

There is no available error in the instructions given to the jury. It was immaterial whether the consolidation resulted in one or in two corporations having the same officers and stockholders.

The decree cannot be complained of by the appellants. The default of the other defendants justified the decree as rendered.

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Substantial justice was done between the appellee and the appellants; no error was committed by the court below, of which the latter have any right to complain.

Judgment affirmed, with costs.

B. F. Claypool, T. A. Hendricks, O. B. Hord, A. W. Hendricks, and C. L. Holstein, for appellants.

Hunter & Daugherty, J. P. Siddall, N. H. Johnson, and W. S. Ballenger, for appellee.

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PRACTICE.—Parties.—Capacity to Sue.—A demurrer for the statutory cause of want of legal capacity to sue has reference to some legal disability of the plaintiff, such as infancy, idiocy, or coverture, and not to the fact that the complaint upon its face fails to show a right of action in the plaintiff.

SAME.—Plaintiffs.—Misjoinder of.—Where two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, the proper mode of taking advantage of the defect is by demurrer to the complaint, because it does not state facts sufficient to constitute a cause of action; and the defect can only be cured by striking out the name of the plaintiff improperly joined, or by so amending the complaint as to show a right of action in all the parties.

SAME.—Obstruction of Highway.—Injunction.—In an action to enjoin the obstruction of a public highway within the limits of an incorporated town and under the jurisdiction and control of such corporation, brought by a plaintiff who predicates his right to such relief on the ground that he is the owner of certain lots fronting upon the highway obstructed, such corporation is not a necessary party plaintiff.

SAME.—Another Action Pending.—Suit by the owner of certain town lots denying the existence of a highway upon and along a portion thereof, as claimed by the defendant, and seeking to quiet the plaintiff's possession of the lots, freed from the claim of such highway, praying a perpetual injunction against the defendant restraining him from disturbing the plaintiff's possession or asserting an easement over the lots as a public highway. After an-

31	355
136	653
31	855
141	11
31	355
150	313
31	355
157	233
31	855
162	545
31	355
165	131

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swer and reply, the defendant filed a cross complaint, asserting the existence of an easement as a public highway over a part of said lots, charging the plaintiff with having unlawfully obstructed it, to the special injury of the defendant, and praying that the plaintiff be perpetually enjoined from repeating or continuing such obstruction.

Held, that the cross complaint was not bad on demurrer on the ground that another action was pending between the same parties for the same cause, to wit, the original complaint, the answer, and the reply.

Highway.—User.—A county road was located by the board of county commissioners, in 1840, over certain lands, the location being defective for not specifying the width of the highway; but, in pursuance of the order of the commissioners, the supervisor of the proper road district opened and improved the road, thirty feet in width, as a public highway, and it was continuously thereafter kept, maintained, and used by the public as a public highway, in the same place and of the same width, with the knowledge and consent of the owners of said lands, for more than twenty years.

Held, that these facts showed the existence of a public highway by user.

SAME.—Vacation of.—Town.—The corporate limits of a certain town extended to and along the middle of a county road, thirty feet in width, located before the town was laid out.

Held, that the board of trustees of the town had not power under the ninth clause of section 22 of the act for the incorporation of towns, 1 G. & H. 624, to vacate so much of said highway as was within the corporate limits.

APPEAL from the Jay Circuit Court.

Debolt, the appellant, filed his complaint in the Randolph Circuit Court, at the September term, 1866, against Carter, Commons, Murphy, and Eisenhour, alleging, in substance, that the plaintiff is, and for eleven years has been, the owner in fee simple of lots numbered 290 and 291, in the corporate town of Union, in said county; that, to enclose and improve said lots, in the year 1862, he erected a fence on his own grounds, immediately south of the north line of said lots, and has since continued and maintained said fence as a part of the enclosure of said lots, as he lawfully might do; that the defendants and others falsely pretend and claim that there is a county road, thirty feet in width, on and along the north line of said lots, said north line being in the middle of said road, and hence, that fifteen feet in width along the north side of said lots is servient to the easement of said highway, and that the same exists thereon, when, in truth, there is no such county road on and along the said

north line of said lots, nor is there any such easement upon said fifteen feet in width, nor is the said fifteen feet in width servient to any such county road and highway; that no such county road was ever lawfully located and established there along said line, thirty feet in width, with said line in the middle thereof; nor did any of the owners of the land at any time while they owned it, dedicate fifteen feet in width immediately south of the north line of said lots, or any other width or portion of said lots, to the use of a county road or any other highway; nor have the public by use acquired a right of way for a county road or any other highway on and over said fifteen feet in width; yet the defendants, to vex, harrass, and oppress the plaintiff, and to deprive him of the use and enjoyment of said strip of fifteen feet in width, and to compel him at great expense to remove his said fence fifteen feet south of where it now stands, and then to admit that there is an easement of a county road and highway existing upon said fifteen feet, when there is none existing on it, and by so doing to acquire from the plaintiff a right of highway on and over said fifteen feet of ground, heretofore, to wit, on, &c., caused an information to be filed in the court of common pleas of said county against the plaintiff for obstructing said pretended highway by said fence and enclosure, of which charge the plaintiff was afterwards, to wit, at the February term, 1866, of said court, acquitted and discharged, upon a trial on the merits; that afterwards, to wit, on, &c., the defendants, for the purpose aforesaid, brought an action in the name of the defendant Murphy, as trustee of the township, on the relation of the defendant Eischour, as supervisor of the road district, against the plaintiff, in the court of a justice of the peace named, of said county, for forty days' obstruction of said pretended road and highway by said fence, which action is still pending in the court of said justice; that the defendants, for the purpose aforesaid, are threatening to bring other similar actions against the plaintiff for other similar pretended offenses, and thus vex and harrass

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the plaintiff till, out of sheer exhaustion, he shall yield to their unjust and illegal demands to grant them an easement on said fifteen feet in width of ground, by removing his fence and surrendering it to them for that purpose, when, in truth, their whole claim to said easement is false and baseless; that inasmuch as said justice and said court of common pleas have not jurisdiction to try and determine, decide and settle, the question whether or not said pretended easement exists on said lots or any portion of them, and this court is the only one that has original jurisdiction of that question and judicial power to settle and determine the same, and inasmuch as that question cannot be settled and quieted in any of said actions, the plaintiff brings this action to settle said question and quiet him in the peaceable enjoyment of his said property, free and discharged from the said pretended claim of highway and easement resting on it; and he prays the court to compel the defendants to set up in this action their said pretended claim to an easement upon said lots or any portion of them, and state specifically on what grounds they claim the same, whether by the due location and establishment of said pretended road by the board of commissioners of the county, or by the dedication of said lots or any portion of them for the purpose of a county road and highway by any owner thereof while owner, or by right of highway acquired by user; that the court upon a final hearing and determination of this action may settle and quiet that question forever, and quiet the plaintiff in the peaceable and uninterrupted enjoyment of his said lots; and plaintiff prays the court to grant its writ of prohibition directed to the defendants and said justice, prohibiting them and each of them from further proceeding in said action, and to grant the plaintiff all other necessary and proper relief.

After answer and reply, upon which no question arises here, the defendants filed a cross complaint, in substance as follows: that heretofore, to wit, on or about the — day of — 1840, and at the — term of the board of commissioners of the county and State aforesaid, a petition was presented to

said board by divers citizens of said county, praying the location and establishment of a public highway in said county, in part upon the following lands lying and being therein, to wit, the east half of section 25, township 18, range 1, west; that pursuant to the prayer of said petition, said board appointed viewers to examine said proposed road, and report thereon; and afterwards, to wit, on, &c., such proceedings were had thereon that said board of commissioners ordered said proposed road to be opened as a public highway, all of which appears of record; but the complainants say that said record and proceeding is defective, in this, that the same does not prescribe the width of said highway; nevertheless, in pursuance thereof said road was, on the — day of — 1840, opened by the supervisor, as a public highway for travel and for the accommodation of the public, to a width of thirty feet, along and over a portion of the said lands, and the same was kept and continued at the same place continuously thereafter for more than twenty years, and until the making and causing of the obstruction hereinafter set forth; that during all this time the supervisors worked and repaired said road as a public highway, and the same was continuously and uninterruptedly used as such by the public generally; that said highway was located upon said lands and set apart for the public use as such by and with the knowledge and consent of the owner of said lands at that time, and has ever since, except as hereinafter stated, been used and enjoyed by the traveling public as such, by and with the leave, license, and permission of the owners of said lands; whereby said lands became and were subject to an easement in favor of the complainants and the public, by which they have a right to use and enjoy the same as a public highway; that said easement extends to, upon, and over, thirty feet of the north part of lots numbered 290 and 291 in Union City, in said county, the same being a subdivision of the lands aforesaid; and that said lots, to the extent aforesaid, are subject to said easement, and constitute a part of said public high-

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way; that the complainants are citizens of the township of Wayne, and county aforesaid; that said John Commons and Samuel S. Carter, defendants, live near to the public highway aforesaid; that they own lots on and fronting upon said highway, and that for many years, to wit, for ten years before the obstruction hereinafter mentioned, all the defendants had enjoyed the privileges, immunities, and benefits of the same; that said Robert Murphy is the trustee of said Wayne township; and said Eisenhower was, at the time of the commencement of plaintiff's action, supervisor of the road district in which the lands aforesaid are situated; that the plaintiff in this action, on the 1st day of September, 1864, wholly obstructed said road and highway at the point where it crosses said lots, by building fences in and upon the same, and by setting out trees thereon; that by reason of such obstruction the complainants in this cross action and the public are wholly deprived of the use thereof; that said obstruction puts them and the public to great trouble, vexation, and inconvenience; that this is the identical matter referred to by the plaintiff in his complaint. They pray, that on a final hearing the court will adjudge and decree thirty feet off the north part of said lots to be a public highway; that so much of said lots be made subject to said easement in favor of the public for the uses and purposes of such highway; that the plaintiff, Debolt, be required to at once remove said obstruction; that the court will settle the title and right of the public in and to said easement, and forever enjoin said Debolt from molesting, hindering, or obstructing the enjoyment thereof, and grant them such other and proper relief as they may be entitled to have.

The appellant demurred to the cross complaint for the following reasons:

"1. That the said Murphy and Eisenhower have not legal capacity to sue and maintain the said cross bill, because they are not the town of Union, nor are they or either of

them the street commissioner of said town, or the supervisor of the district in which is the place in which, &c.

"2. As to all the plaintiffs in the cross bill, the plaintiff demurers because there is another action pending between the same parties for the same cause, to wit, the complaint of the plaintiff in this action, and the defense set up to it by the defendants, and the reply thereto.

"3. Because there is a defect of parties plaintiffs in said cross bill, as neither the town of Union nor any of its officers for it is plaintiff in said cross bill."

The demurrer was sustained as to the first cause, and overruled as to the other causes.

The appellant then demurred to the cross complaint for the cause, that it does not state facts sufficient to constitute a cause of action.

The court overruled the demurrer, and the appellant excepted. The appellant answered the cross complaint in five paragraphs, the fifth being the general denial.

The appellees replied to the first paragraph of the answer by the general denial, and demurred to second, third, and fourth paragraphs. The demurrers were sustained, and the appellant excepted.

On the application of the appellant, the venue was changed to the Jay Circuit Court, where the appellant filed his plea *pais darrein continuance* to the cross complaint, alleging that the complainants in the cross complaint ought not further to maintain their counter claim and cross bill of complaint against the plaintiff, because he says that after the change of venue granted in this cause by the Randolph Circuit Court, where this cause was last continued until the present term of this court, and before this day, to wit, on the 9th day of September, 1868, the board of trustees of the town of Union, on petition presented to them, and on mature deliberation thereon had by them, by their order duly entered upon the records of their proceedings, a copy of which, duly certified and authenticated, is filed and made a part of this paragraph, ordered and adjudged that said fifteen feet

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in width on the north side of said lots numbered 290 and 291, in said town of Union, was not needed as a highway, and that said pretended highway set up and claimed thereon in said cross complaint was not of public utility or needed as a highway; and said board granted said petition and ordered as aforesaid, that the highway on fifteen feet in width immediately south of the north line of the southeast quarter of section 25, in township 18, range 1, west of the first meridian, to wit, on the fifteen feet in width on the north side of lots 290 and 291, and nine other lots described by their numbers, in the town of Union City, be, and the same was then and thereby vacated, &c.

This paragraph was sworn to by the appellant, and a copy of the proceedings of the board of trustees of Union City, certified under oath by the clerk of the corporation of the town of Union City, is filed therewith.

The appellees demurred to said plea *puis darrein continuance*, the demurrer was sustained, and the appellant excepted.

Thereupon the appellees moved the court to proceed to trial upon the issues formed in the cause, to which the appellant objected, "because said plea was peremptory, and was a waiver of all previous issues in the cause, and he, the said Debolt, had not brought his proof as to said issues."

The court overruled the objection, and permitted the appellees to proceed to the trial; to which ruling the appellant excepted.

The court having found for the appellees, the appellant moved for a new trial. The court overruled the motion, and rendered judgment, dismissing the original complaint, adjudging, "that there is a public highway fifteen feet in width over and across the whole of the north end or side of" said lots, ordering the appellant to remove his fences from it, perpetually enjoining and restraining him from obstructing said highway and from hindering or molesting the public in the enjoyment of said easement, and adjudging costs against the appellant.

ELLIOTT, C. J.—A number of questions are presented by the appellant upon which a reversal of the judgment of the circuit court is claimed. They will be examined in the order in which they are presented by the record, rather than that adopted by the appellant's counsel.

It is contended by the appellant, that the demurrers to the cross complaint, for the reasons, first, that there is a defect of parties plaintiff; second, that it appears upon the face of the complaint that there is another action pending between the same parties, for the same cause; and third, that the complaint does not state facts sufficient to constitute a cause of action, should have been sustained.

Of these in their order. But before entering upon their discussion, it is proper to observe, that the cross complaint was originally filed by all the defendants in the original action, viz.: Carter, Commons, Murphy, and Eisenhour. A demurrer, however, was sustained to it as to Murphy and Eisenhour, because of their want of capacity to sue. This ruling of the court, in effect, struck the names of Murphy and Eisenhour from the complaint, and left it to be prosecuted in the names of Carter and Commons only. It was subsequent to this ruling that the appellant demurred to the complaint, because it did not state facts sufficient to constitute a cause of action. A demurrer for the statutory cause of the want of legal capacity to sue, has reference to some legal disability of the plaintiff, such as infancy, idiocy, or coverture, and not to the fact that the complaint upon its face fails to show a right of action in the plaintiff. It was held in *Berkshire v. Shultz*, 25 Ind. 523, after a very careful consideration of the question, that where two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, the proper mode of taking advantage of the defect is by a demurrer to the complaint, because it does not state facts sufficient to constitute a cause of action; and that the defect can only be cured by striking out the name of the plaintiff

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improperly joined, or by so amending the complaint as to show a right of action in all the parties.

Under this ruling, the demurrer in the case at bar was improperly sustained as to Murphy and Eisenhower, on the ground of their want of capacity to sue; but the appellant cannot complain of that error; and, as it disposed of the case as to Murphy and Eisenhower, and not as to the other plaintiffs, the latter were left as the only plaintiffs in the case, and could continue its prosecution, as though the complaint were amended by striking from it the names of Murphy and Eisenhower as plaintiffs.

We return to the questions raised by the demurrers. And first, does the complaint show a defect of parties plaintiffs? It is insisted, that as the town of Union is incorporated, and that part of the alleged highway extending over a portion of the lots of the appellant is within the corporate limits of the town, the corporation should have been made a party plaintiff. We do not think so.

The appellees predicate their right to the relief prayed on the ground that they are the owners of lots fronting on the highway which the appellant had obstructed, and was still threatening to obstruct, denying the existence of such highway, and thereby disturbing them in its enjoyment, to their injury. They seek to redress a personal injury to themselves, and if it be admitted that the corporation possessed jurisdiction and control over the highway—a question which will be examined in another part of this opinion—still it was not a necessary party plaintiff in the cross complaint.

2. Does the complaint show on its face that there was another action pending when it was filed, between the same parties for the same cause?

It is insisted by the appellant's counsel, that the original action in this case by the appellant against the appellees and others, and in which the cross complaint is filed, is another action for the same cause, within the meaning of the law. Both the original and cross complaints are appeals to

the chancery powers of the court. The original complaint denies the existence of the alleged highway, seeks to quiet the appellant's possession of the lots described, freed from the claim of such highway, and prays for a perpetual injunction against the appellees from disturbing his possession or asserting an easement over the lots as a public highway. It can only be supported as a complaint in chancery, *quia temet*.

The cross complaint, though involving the same subject, is, in its object, just the reverse of, and antagonistic to, the original complaint; it asserts the existence of an easement as a public highway over a part of the appellant's lots, charges the appellant with having illegally obstructed it, to the injury of the appellees, and prays that he be perpetually enjoined from repeating or continuing such obstruction. It prays affirmative relief, which could not be properly granted upon a successful defense merely, of the original suit; it was not for the same cause as the original complaint; and the demurrer for that cause was properly overruled.

3. The remaining cause of demurrer is, that the cross complaint does not state facts sufficient to constitute a cause of action. The first objection made to its sufficiency under this cause of demurrer is, that it appears by the cross complaint that the alleged location of the highway by order of the board of county commissioners is a nullity, and that the facts stated do not show the existence of a valid highway, either by user or dedication.

It is alleged in the cross complaint, that in the year 1840, a public highway was located and established by the board of commissioners of Randolph county, a part of which was located on the land now constituting the lots of the appellant; that the location, however, was defective in not specifying the width of the highway, but that in pursuance of the order of the commissioners, the supervisor of the proper road district did, in the year 1840, open and improve the same thirty feet in width—being in part upon the lots of the appellant, as a public highway; and that it was contin-

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uously thereafter kept, maintained, and used by the public, in the same place, and of the width aforesaid, and with the knowledge and consent of the owners of said land, as a public highway, for more than twenty years, and until it was unlawfully obstructed by the appellant. The facts thus alleged clearly show the existence of a valid public highway by user. It is declared by statute, that "all public highways which have been or may hereafter be used as such, for twenty years or more, shall be deemed public highways." 1 G. & H. 366, sec. 45. See also *Epler v. Niman*, 5 Ind. 459; *Hays v. The State*, 8 Ind. 425; *Jackson v. Smiley*, 18 Ind. 247. The facts alleged in the cross complaint are clearly sufficient to entitle the appellees to the relief prayed, and the demurrer to it was therefore properly overruled.

Another question presented in the case arises upon the ruling of the court in sustaining the demurrer to that paragraph of appellant's answer to the cross complaint called a plea *puis darrein continuance*, setting up a vacation of the highway in controversy, pending the litigation, by the board of trustees of Union City.

Two objections are urged by the appellees' counsel to the sufficiency of that paragraph. They are:

1st. That the board of trustees had no jurisdiction over, or power to vacate, the highway, it not being a street or alley of the town, within the meaning of the statute for the incorporation of towns.

2d. That if the board of trustees possessed such power, still the answer fails to show that it was exercised in conformity with the law; and that the order of vacation was therefore null and void.

It is claimed by the appellant's counsel, that the ninth clause of section 22 of the act for the incorporation of towns (1 G. & H. 624) conferred on the board of trustees of the town the power to vacate so much of the highway in controversy as was within the corporate limits. That clause reads thus: "*Ninth*. To lay out, open, grade and oth-

erwise improve the streets, alleys, sewers, sidewalks and crossings, and keep them in repair, and to vacate the same."

The board of trustees of an incorporated town is a tribunal of special limited powers and jurisdiction, which are conferred by statute for special purposes.

By the ninth clause of the section referred to, the power to vacate streets and alleys, within the corporate limits of the town, is conferred on the board of trustees. The words "streets and alleys" relate exclusively to the ways or thoroughfares of towns and cities. Ordinarily, they are laid out and dedicated to the public use, and especially for the use and convenience of the property holders of the town or city, by the proprietor thereof, or are laid out and established for the same purposes by the corporate authorities. "Highway" is a word of much broader signification; it includes every species of ways over which the public at large have a right of passage, whether they be roads, navigable rivers, or streets and alleys. Thompson Highways, pp 1, 6. Hence, whilst every street is a highway, yet every highway is not a street. A clear distinction is recognized by the Constitution and laws of this State between common roads, or highways, and the streets and alleys of towns or cities. See sec. 22, art. 4, of the Constitution, 1 G. & H. 40; the act to provide for the opening, vacating, and change of highways, 1 G. & H. 359; the act touching the laying out and vacating towns, streets, alleys, &c., 1 G. & H. 632; *The Common Council of Indianapolis v. Croas*, 7 Ind. 9; *City of Lafayette v. Jenners*, 10 Ind. 70-79. It is said in the case last cited, that "a highway is not a street, either technically or in common parlance."

In the case under consideration, the part of the highway in controversy is located on the line dividing the south-east quarter from the north-east quarter of a section of land. Subsequent to the location of the highway, the town of Union City was laid off on the south-east quarter of the section, with a tier of lots, including those of the appellant, extending to the north line of said quarter section, and con-

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sequently to the middle of the highway, the whole width thereof being thirty feet.

The order of vacation set up by the appellant is, "that the highway on fifteen feet in width immediately south of the north line of the south-east quarter of section," &c., "to wit, on the fifteen feet in width on the north line of lots (here the numbers of eleven lots, including those of the appellant, are given), in the town of Union City, be and the same is hereby vacated." It thus appears that the order of vacation only extends to one-half of the width of that part of the highway, thereby reducing it to fifteen feet in width. It is not claimed that it was a street or alley of the town, nor was it vacated as such, but as a highway.

It seems very clear that the board of trustees of the town had no jurisdiction or power, under the law, to grant the order of vacation, and it is therefore void. It follows that the demurrer to the answer setting it up was properly sustained.

This conclusion renders an examination of the second objection to the answer unnecessary.

It is also claimed, that the court erred in proceeding to the trial of the issues made upon the cross complaint prior to the filing of the answer *puis darrein continuance*, after the demurrer to that answer was sustained. At common law such a plea is a waiver of all previous pleas, and upon a demurrer being sustained to it, entitles the plaintiff to judgment. Whether that rule is applicable to the facts of this case, need not be determined; as, if the action of the court in proceeding to trial was erroneous, the error did not affect any substantial right of the appellant, and could not reverse the judgment. 2 G. & H. 122, sec. 101.

Sustaining the demurrer to the second, third, and fourth, paragraphs of the appellant's answer to the cross complaint is assigned for error, and insisted upon in argument; but as the abstract contains no statement of the nature or substance of these paragraphs, we do not examine the question.

Judgment affirmed, with costs.

FRAZER, J.—I do not concur in the opinion that a highway lying within the boundaries of an incorporated town is not a street in the sense of our various statutes, and not within the jurisdiction of the corporate authorities as fully as any other street. I am of quite the contrary opinion. Streets and highways in a town are all highways, and, in my opinion, are correctly designated by the use of either name. I can conceive of no possible practical good likely to result from holding that within such corporations some highways shall, as to the power of vacating them only, be under the jurisdiction of the corporation, while others shall be subject to the control of county commissioners. But I do perceive that embarrassment and confusion will continually flow from it. Thus, if an existing road be adopted as a street, it could only be changed or vacated by the utterly useless process of procuring the concurrent action of two independent bodies.

Then, the act of March 3d, 1859 (1 G. & H. 594), gives the corporate authorities complete control of the supervisor within the town. He must repair such ways as they order, and allow such to be or become impassable and useless as they may deem useless. What conceivable reason, then, could have moved the legislature to intend that, nevertheless, the county commissioners must be invoked to vacate any such way? There is none which seems to me satisfactory. It was never intended, I think. In the case of cities the matter is put beyond cavil or quibble. Acts 1865 (Spec. Sess.), p. 27, sec. 58. And in the last named act it is plain, I think, that the word "street" is used to signify "highway." Why should a highway have less sanctity in a city than in an incorporated town? I cannot impute to the legislature an intention to require a thing plainly useless, in the presence of language which, without violence to it, seems to admit of a different construction.

J. Smith and M. Way, for appellant.

T. M. Browne and G. H. Bonebrake, for appellees.

Ex Parte Tongate.

EX PARTE TONGATE.

CRIMINAL LAW.—Term of Imprisonment.—Where a defendant was sentenced to an imprisonment in the county jail for ninety days, and until a fine of one dollar and the costs of the prosecution were paid or replevied; *Held*, that when the imprisonment for the ninety days had been completed, that portion alone of the sentence was discharged, and there remained the imprisonment for the fine and costs—that the defendant was not entitled to a credit of fifty cents per day upon the fine and costs from the date when his imprisonment commenced.

APPEAL from the Orange Common Pleas.

RAY, J.—Tongate was sentenced to an imprisonment in the county jail for ninety days, and until a fine of one dollar and the costs of the prosecution were paid or replevied. At the expiration of the ninety days he applied for a discharge, on the ground that under section 130, 2 G. & H. 421, he was entitled to a credit of fifty cents per day upon the fine and costs from the date when his imprisonment commenced. This application was refused. The ruling was correct. The imprisonment for ninety days was only a part of the sentence, and must be completed before the other portion of the same sentence could begin. It is not like two penalties, imposed for two separate offenses, where both are held to run together. *Miller v. Allen*, 11 Ind. 389. In this case, when the imprisonment for the ninety days had been completed, that portion of the sentence alone was discharged, and there remained the imprisonment for the fine and costs.

Judgment affirmed, with costs.

H. Heffren, for appellant.

The Fishback and Elizabethtown Gravel Road Co. v. Wilson.

THE FISHBACK AND ELIZABETHTOWN GRAVEL ROAD COMPANY
v. WILSON.

PRACTICE.—*Finding Beyond the Issue.*—*Motion for Judgment on Finding.*—On the trial in the circuit court of an action commenced before a justice of the peace, to recover upon a stock subscription, the execution of the instrument not being denied by the defendant under oath, the court found specially for the plaintiff every point in issue, so that judgment could have been rendered for the instalment sued for, but found further, that after the defendant had executed the instrument it had been altered in a material part, without his knowledge or authority, and, over a motion by the plaintiff for a new trial, rendered judgment, without further objection, for the defendant. *Held*, that the motion for a new trial did not raise any question; but a motion for judgment on the finding should have been made in order to present the question involved to the circuit court.

Held, also, that the question could not be made for the first time in the Supreme Court.

APPEAL from the Hendricks Circuit Court.

FRAZER, J.—This suit originated before a justice of the peace. It was to recover calls upon a written subscription for stock of the appellant. The execution of the instrument was not denied under oath, as is made necessary by statute to put that matter in issue. 2 G. & H. 585, sec. 34. A jury was waived, and the court found specially for the appellant every point in issue, so that judgment could have been rendered for the instalments sued for. But the finding went beyond the issue, declaring that after the appellee had executed the instrument it had, without his knowledge or authority, been altered in a material part. A motion for a new trial by the appellant upon two grounds, first, that the finding was against the evidence; second, that it was contrary to law, was overruled and an exception taken. Judgment was then, without objection, rendered for the defendant below.

The issues having been found for the appellant, a motion for a new trial by it was not the way to raise any question. A motion for judgment upon the finding should have been made, in order to present to the court below the question to

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which our attention is called. As that was not done, the only inquiry that presents itself is, can the question be made, for the first time, in this court? It would be contrary to the whole current of decisions under the code so to hold. The rule is general and almost universal, that a question cannot be made in this court which has not been made in the court below.

The judgment is affirmed, with costs.

C. C. Nave, for appellant.

L. M. Campbell, for appellee.

ALLEN v. JERAULD.

PARTIES.—*Defect of.*—*Demurrer.*—Answer by way of set-off, alleging, "that before the commencement of this action the plaintiff was, and still is, indebted to the defendant on an account before that time assigned to him in writing by" a third person named but not made a party; copies of the account and assignment being filed therewith.

Held, that the answer was bad on demurrer expressed in the statutory form, for a defect of parties defendants.

APPEAL from the Gibson Common Pleas.

RAY, J.—Complaint by appellee on a promissory note executed by appellant.

Answer in three paragraphs.

1. In denial.

2. Set-off, as follows: "That when this action was commenced, the plaintiff was, and still is, indebted to defendant, on an account, before that time assigned to him in writing by one Sherlow;" copies of the account and assignment being filed therewith.

3. Additional set-off, as follows: "That before the commencement of this action, plaintiff was, and still is, indebted to defendant in a further sum, on an account before that

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time assigned to him in writing by said Sherlow;" setting out copies of the account and assignment, and offering to set off the amount due the plaintiff, and asking judgment for the residue.

Demurrers to the second and third paragraphs of the answer were sustained. The grounds of the demurrers were: first, that said paragraphs did not state facts sufficient to constitute a defense to the plaintiff's action; second, that said paragraphs show a defect of parties defendants.

It is objected, that the demurrer for defect of parties defendants does not point out the defect and name the parties who should have been joined. This demurrer is in the statutory form, and as the code expressly requires the assignor of an account to be joined as defendant in the action, and as the name of the assignor appears in the answer and bill of particulars, we do not regard it as proper to reverse the action of the court below where it has taken notice of the defect apparent on the face of the answer and sustained the demurrer.

The judgment is affirmed, with five per cent. damages and costs.

W. M. Land, for appellant.

D. F. Embree, for appellee.

GREGG v. MATLOCK.

STATUTE OF LIMITATIONS.—*Absence from the State on Public Business.*—*Volunteer Soldier.*—Absence from the State as a volunteer soldier or officer in the army of the United States constitutes absence on public business within the meaning of the statute which provides, that "the time during which the defendant is a non-resident of the State, or absent on public business,

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shall not be computed in any of the periods of limitation" (2 G. & H. 161, sec. 216).

APPEAL from the Hendricks Circuit Court.

Gregg sued Matlock before a justice of the peace, on an account for sixty-eight dollars, for professional services as an attorney.

Answer, the statute of limitations.

Gregg recovered before the justice, and Matlock appealed to the circuit court.

Gregg, by leave of the court, filed an amended reply to the answer, alleging, in substance, that the cause of action accrued to the plaintiff on the — day of April, 1862; and that the defendant left the State of Indiana on public business, to wit, as a volunteer in the army of the United States, on the — day of August, 1862, and was absent from said State of Indiana, on public business, as an officer in the 70th regiment of Indiana volunteers, in the service of the United States, until the — day of September, 1864, a period of over two years, after the cause of action accrued, and before six years had elapsed; that this suit was commenced before the justice of the peace who tried it, on the 28th of November, 1868, and, deducting the time that the defendant was absent from the State on public business as aforesaid, within six years after the cause of action accrued. The court sustained a demurrer to the reply, and, the plaintiff refusing to reply further, rendered final judgment for the defendant.

An exception was taken to the ruling on the demurrer. The correctness of that ruling is the question presented in this court.

ELLIOTT, C. J.—Actions on accounts and contracts not in writing, if not commenced within six years next after the cause of action accrues, are barred by the statute. 2 G. & H. 156, sec. 210. But section 216 provides, that "the time during which the defendant is a non-resident of the State, or absent on public business, shall not be computed in any

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of the periods of limitation." Here, the reply alleges, that the cause of action accrued in April, 1862, and that the defendant left the State on public business, as a volunteer soldier in the army of the United States, in August of the same year, and so continued absent from the State, as an officer in the army of the United States, until September, 1864, a period of over two years; and that the suit was commenced on the 28th of November, 1868. It thus appears that the suit was commenced within six years and eight months next after the cause of action accrued; but if from that period there be deducted the time the defendant was absent from the State in the army, as alleged in the reply, a period of over two years, then the statute could not have run six years before the commencement of the suit. This leaves to be considered the question, does the absence from the State as a volunteer soldier or officer in the army of the United States constitute an absence on public business within the meaning of the statute? We think it does. The statute does not limit the exception to any particular kind or form of public business. A service in the army of the United States is a public service, required for the public good, and every person so employed is engaged in public business.

We think the reply a good one, and that the court erred in sustaining the demurrer to it.

Judgment reversed, with costs, and the cause remanded, with directions to the circuit court to overrule the demurrer to the reply, and for further proceedings.

RAY, J.—I cannot concur in the opinion of the majority of the court. Statutes of limitation are for the repose of debtors. It has been held, that a volunteer soldier or officer in the army of the United States does not lose his residence; he may be sued, and service may be had upon him by copy left at his place of residence. If thus exposed to litigation while absent, and yet excluded from the benefit of the statute, his absence "on public business" simply imposes upon

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him a burden from which those who avoid such service are exempt. I cannot give the statute a construction which, in place of giving peace, prolongs litigation.

C. C. Nave, for appellant.

L. M. Campbell, for appellee.

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JURISDICTION.—*Pleading.*—In pleading a record of a judgment, it is unnecessary to show by averments that the court had jurisdiction.

SAME.—*Decedents' Estates.*—*Proceeding to sell Real Estate.*—An application to sell lands in the course of administration stands upon the footing of an ordinary adversary judicial proceeding in a court of superior jurisdiction.

SAME.—*Collateral Proceeding.*—Where jurisdiction has been acquired in such a proceeding, subsequent errors in the course of its exercise—as in the order of sale and its confirmation—however grave and glaring, will not subject the judgment to successful collateral attack.

PLEADING.—*Exhibits.*—Where, in an action to recover possession of real estate, the defendant claims title through a sale and conveyance to him under an order of court granted upon the application of an administrator, to make assets to pay debts of the decedent, the answer need not aver that a real estate bond was filed, but copies of the record and the deed must be exhibited as parts of the answer.

APPEAL from the Blackford Circuit Court.

FRAZER, J.—This was an action to recover the possession of real estate, brought by the appellants against the appellee. An answer and cross complaint was filed, which was held good on demurrer; and we are to determine whether the court below erred in overruling the demurrer.

The pleading demurred to was an attempt to show title in the defendant. It alleged, that one S. had died, intestate, seized in fee simple of the land; that his administrator filed in the probate court a proper memorial praying an order to sell the land to make assets to pay the debts of the intestate; that at the November term of that court for 1849, it was

ordered that a sale be made, at private sale, at not less than two-thirds of \$325, the appraised value of it; that at such private sale the defendant purchased it for the price of \$216.66, which was fully paid; that this sale was confirmed at the August term, 1850, of said court, and a deed therefor executed; that said orders of the probate court remain in full force. Copies of the record and deed were not made parts of the answer.

It was long ago settled, that in pleading a record of a judgment, it is unnecessary to show by averments that the court had jurisdiction. This rule was founded in convenience, to avoid prolixity in pleading, though more anciently it was otherwise. This objection to the answer cannot therefore be allowed. *Murray v. Wilson*, 1 Wils. 316; *Lane v. Robinson*, 2 Mod. 102.

So, also, as to the objection, that the answer discloses that the sale, being private, was ordered to be made for not less than two-thirds of its appraised value—the law requiring the full appraised value—and that the sale was for two-thirds of a cent less than two-thirds of the appraisement. That the probate court ordered and confirmed such a sale, may have been error which would have reversed its judgment; but it does not follow that the proceeding is to be held void when questioned collaterally. The order of sale and its confirmation were steps in the exercise of jurisdiction. If that had been acquired, subsequent errors, such as these, however grave and glaring, would not subject the judgment to successful collateral attack. *Crossley v. O'Brien*, 24 Ind. 325, is not in conflict with this view. There was no collateral questioning of the proceedings in that case. It was a direct appeal in the cause; but in the course of the opinion the distinction between proceedings essential to jurisdiction and those in the course of its exercise afterwards, was stated. Nor does *The Evansville, &c. R. R. Co. v. Evansville*, 15 Ind. 395, touch the present question. Nor can decisions as to the special statutory powers conferred on courts, where the statute must be followed at every step, in order to give va-

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lidity to the exercise of the power, be deemed in point upon the present question. It has been so long settled in this State as to close the question against further controversy, that an application to sell lands in the course of administration stands upon the footing of an ordinary adversary judicial proceeding in a court of superior jurisdiction.

Whether the failure to give a real estate bond would render the sale void, need not now be decided. That question does not arise, the answer averring nothing upon that subject, and it being unnecessary that it should aver the fact. The question could have been made by a reply impeaching the validity of the sale for the want of such bond, and if, in fact, none was given, the defendant would have been driven to demur thereto, thus presenting the question.

Was it necessary to exhibit, as parts of the answer, copies of the decree and deed, or either of them? They constituted the foundation of the defense, and the seventy-eighth section of the code imperatively requires the copies. The cases holding that this defect can be reached by demurrer are too numerous to require a specific citation of them. On this account the demurrer should have been sustained.

Judgment reversed, with costs; and the cause remanded, with directions to sustain the demurrer.

J. W. Gordon and W. March, for appellants.

J. Brownlee, for appellee.

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CONSIDERATION.—*Failure of.—Promissory Note.*—Suit on note. Answer, that the note was given for the exclusive right within a certain county to a patent invention, known as, &c., under letters patent from the United States to a person named, which was an infringement of a patent theretofore issued by the United States to another patentee named, and precisely like the

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latter in every important particular; that the purchase was made and the note given upon the representation that said invention had never been used except under the first mentioned patent, whereas the right to use it under the other patent had been sold and the invention used over the entire county, and the sale of the right under said first mentioned patent was rendered of no value.

Held, that the answer presented a good defense.

APPEAL from the Howard Circuit Court.

RAY, J.—Suit upon a note. Answer, that the note was given for the exclusive right within the county of Wayne to a patent invention, known as the weather or door strip, under letters patent from the United States to one Joseph Chadwick; that said patent was an infringement of a patent theretofore issued by the United States to one J. O. Clay, and the same were precisely alike in every important particular; and that the purchase was made and the note given upon the representation that said invention had never been used except under the Chadwick patent, whereas the right to use the same under the Clay patent, had been sold and the same used over the entire county, and the sale of the right under the Chadwick patent was rendered of no value. Judgment for the appellee.

We have examined the evidence, and find it fully sustains the answer. We have no brief from the appellee, and can see no evidence to support the finding and judgment of the court.

Judgment reversed, and the cause remanded for a new trial. Costs here.

J. H. Kroh and *C. N. Pollard*, for appellant.

Duckworth and Others v. Matlock and Others.

DUCKWORTH and Others v. MATLOCK and Others.

PLEADING.—*Will.—Probate of.*—A complaint seeking probate of an alleged will, avering that the defendant pretended that such a will as was described and of which a copy was set out was not duly executed, did not allege that the defendant had the custody of the will, nor did the plaintiff offer to produce it.

Held, that the complaint was bad on demurrer.

APPEAL from the Putnam Common Pleas.

Suit against the appellees, Eliza Matlock, James Matlock, her husband, and Thomas S. Vermillion, administrator of the estate of Amos Hibbs, deceased, the complaint alleging, that said Amos left a will in full force, by which he disposed of all his personal and real estate; that at the time of making the will said Amos had a wife alive, named Lydia, who is mentioned in the will; that said Lydia died, intestate, there being no issue of said marriage, and said Lydia leaving surviving her no child or descendant of any child, and no father or mother; that afterwards said Amos intermarried with the defendant Eliza, by whom he had no issue; that on the 24th of November, 1866, said Amos died, leaving surviving him said Eliza, his widow, who afterwards became, and now is, the wife of defendant James Matlock; that said Amos also left surviving him the plaintiffs, being certain of his nephews named as legatees in said will and his brothers and sisters and descendants of his deceased brothers and sisters, but left no father or mother and no child or descendant of any child; that said Amos at the time of his death was the owner of, and entitled to the possession of, large and valuable personal and real estate, of the aggregate value of twelve thousand dollars, which property consisted chiefly of moneys, notes, and choses in action; that said Amos, being of sound and disposing mind and memory, made his said last will and testament in writing, bearing date May 21st, 1849, which was duly executed by said Amos in the presence of, and attested by, two credible witnesses named. A copy of the will is then set out, the disposing portion of

which is as follows: "After all funeral expenses are discharged, and all my just debts are paid, I leave my property, personal and real, lands and effects, to my wife, Lydia Hibbs, that she shall have full right power and control over all I possess so long as she remains my widow. After my wife, Lydia Hibbs, ceases to be my widow, I want my effects disposed of in the following manner: I want my three nephews named for me to have one hundred dollars each, to wit," &c., "and then the balance to be equally divided between my brothers and sisters, each one having an equal share."

The complaint further avers, that said testator died without revoking or altering said will; whereupon plaintiffs claim that they are entitled to all of said personal property, except the sum of three hundred dollars claimed by the widow under the statute, and to two-thirds of said real estate, the remaining one-third belonging to the defendant Eliza by her marital rights under the statute; that said property belongs to the plaintiffs in the proportion designated in said will, all of it being subject to the just debts of the testator, which are comparatively nothing; that said Eliza has taken possession and control of all said property, both real and personal, and claims the same as the sole heir of said Amos; that said Eliza, combining and confederating with divers other persons unknown to plaintiffs, pretends that said Amos did not make said will, or that he was not of sound and disposing mind and memory at the making thereof, or that it was not executed as by law required; and therefore she insists that the plaintiffs have no right or title to said estate or any part thereof, but that on the death of said Amos the whole of said estate, both real and personal, descended to her as heir at law; whereas the plaintiffs charge that the contrary is true; that said Eliza refuses to contest the validity of said will during the lifetime of the subscribing witnesses thereof, and threatens that she will hereafter dispute the validity of said will, when all said subscribing witnesses are dead, whereby the plaintiffs will

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be deprived of the benefit of the testimony of said subscribing witnesses and defrauded out of their just dues. The complaint avers, that said Amos at the time of his death was a *bona fide* resident of Putnam county, State of Indiana; and that his property was chiefly, if not solely, situated in said county at the time of his death. The plaintiffs pray permission to make proof of the foregoing facts, and thereby establish and perpetuate said will by making due proof of its execution as the statute directs in such cases; and ask that such orders may be made by the court as may be necessary to perpetuate and establish the testimony of said subscribing witnesses and others that may be necessary for the end proposed; and they pray all other and proper relief.

The defendant James Matlock failed to make appearance and was defaulted.

The other defendants demurred separately to the complaint, on the grounds, first, that the court had no jurisdiction of the subject of the action; second, that there is a defect of parties defendants; third, that said Thomas S. Vermillion is an improper party defendant and ought not to be required to answer herein; fourth, that said complaint does not state facts sufficient to constitute a cause of action against the defendants or either of them; fifth, that several causes of action have been improperly united in said complaint.

The demurrer was sustained, and the plaintiffs excepted. The plaintiffs refusing to amend, judgment was rendered against them.

RAY, J.—It will be observed that the complaint in this case does not aver that the defendants or either of them have the custody of the alleged will, and therefore the facts stated do not authorize a citation against them, or either of them, to produce the same before the court.

The allegation that the widow pretends that such a will as is described in the complaint was not duly executed amounts to nothing. If the appellants have such an instru-

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ment in their possession, they can offer it for probate; if it be in the possession of any one else, they can have a citation requiring the person having such custody to produce the will before the court that it may be proved. 2 G. & H. 556, sec. 25. It will be vain to ask the opinion of this court upon the effect of the subsequent marriage of the alleged testator, by any proceeding other than the method provided by law. The court properly sustained a demurrer to the petition.

Judgment affirmed, with costs.

F. T. Brown for appellants.

S. Turman, for appellees.

DOHERTY v. McWORKMAN.

SUPREME COURT.—*Rules of Court.—Abstracts.*

APPEAL from the Boone Common Pleas.

RAY, J.—The case was submitted November 25th, 1868. The submission was set aside March 22d, 1869, for a failure to file an abstract as required by a rule of this court. May 26th, 1869, an index of the record was filed, which states, that the suit was upon a due bill; answers were filed, which are not stated, either in form or substance, and a reply. Certain interrogatories were also filed which on motion were rejected, but what they were does not appear. The case was tried and a finding had for the defendant, and a motion for a new trial was overruled. The abstract states, that one of the grounds of the motion was, that the evidence did not sustain the finding. As the evidence does not appear in any form in the abstract, and as the appellant has been sufficiently warned by the action of this court in making the order to set aside the submission for the neglect to comply

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with the rule, we will indulge the presumption in favor of the action of the jury and court, and affirm the case, with costs. As an instructive case on the subject of abstracts, we refer the counsel for appellant to *Chapin v. Clapp*, 29 Ind. 611.

Judgment affirmed.

J. W. Burton, for appellant.

O. S. Hamilton and *C. C. Galvin*, for appellee.

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BRIDGES v. LAYMAN and Another.

REPLEVIN.—*Affidavit.*—In an action of replevin in the court of common pleas the affidavit of the plaintiff for delivery of the property to him did not state whether or not it had been seized under an attachment against his property. *

Held, that the affidavit was bad.

JUSTIFICATION.—*Officer.*—*Pleading.*—Where a defendant justifies the seizure and detention of property as a constable, by virtue of an execution in his hands, the original execution or a copy thereof must be filed with his answer.

SAME.—*Evidence.*—The justification cannot be sustained without proper evidence of the contents of the execution.

NAME.—*Initial Letters.*—Where a judgment is rendered before a justice of the peace against a defendant by a name in which an initial letter is used instead of his Christian name, the proceedings and judgment are thereby rendered irregular, but not void.

APPEAL from the Clark Common Pleas.

Replevin by the appellant for a horse, saddle, and bridle, alleged to have been unlawfully taken and detained from him by the appellees, Layman and Clegg.

An affidavit was filed at the commencement of the action, upon which an order was issued, and the property seized and delivered to the appellant. Subsequently, the court, on motion of the appellees, quashed the affidavit, to which the

appellant excepted. Clegg answered by a general denial. Layman filed an answer in two paragraphs:

1. The general denial.

2. Admitting the seizure and detention of the property, but justifying the same as a constable, under an execution then in his hands, issued by a justice of the peace on a judgment in favor of the defendant Clegg against the appellant and one Brooks, for fifty cents and costs of suit.

A demurrer was overruled to the second paragraph of Layman's answer, and the appellant excepted.

Trial by the court; finding and judgment for the defendant.

Motion for a new trial overruled, and the ruling excepted to.

ELLIOTT, C. J.—It is contended by the appellant, that the court erred in sustaining the motion to quash the affidavit upon which the order for the seizure of the property and the delivery thereof to him was issued.

The statute requires the affidavit to show, among other things, that the property has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, &c. The affidavit failed to show whether or not the property had been seized under an attachment against the plaintiff's property. It was therefore defective, and was properly quashed.

The next error assigned is the overruling the demurrer to the second paragraph of the answer of the defendant Layman. By that paragraph Layman seeks to justify the seizure and detention of the property as a constable, by virtue of an execution then in his hands, issued by a justice of the peace on a judgment in favor of the defendant Clegg, against the appellant and one Brooks. The objection urged to it is, that neither the original execution nor a copy thereof was filed with the answer. We think the objection a-

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valid one. The execution is the foundation of the answer; it is the authority by which the defendant claims to have acted and under which he seeks to justify; and, under the statute, either the original or a copy of it should have been filed with the answer. 2 G. & H. 104, sec. 78. The demurrer should, therefore, have been sustained.

It appears upon the face of the answer that the judgment upon which the execution is alleged to have been issued was rendered against the appellant in the name of "D. Bridges;" and it is contended that the judgment is void as to him.

The suit before the justice should have been prosecuted and the judgment rendered against the appellant by his Christian name as well as his surname. The omission of his Christian name was an error, and rendered the proceedings and judgment irregular, but not void. *Jones v. Martin*, 5 Blackf. 351.

The record purports to contain all the evidence given on the trial of the cause; and the refusal of the court to grant a new trial, because the finding and judgment are contrary to the evidence, is assigned for error.

Several objections are urged to the sufficiency of the evidence to sustain the justification; one of which is well taken. The execution upon which the property is alleged to have been seized was not given in evidence nor its absence accounted for. Indeed, there was no evidence of the contents of such a writ. It is apparent from the evidence in the case that the finding for the defendants was based on the answer of Layman, justifying the seizure and detention of the property under the execution; and, for the want of proper proof of the execution, the justification is not sustained by the evidence. The other objections are untenable.

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to sustain the demurrer to the second paragraph of Layman's answer, with leave to both parties to amend their pleadings.

D. Bridges and M. C. Hester, for appellant.

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BROWN v. FREED.

CONTRACT.—Implied Assumpsit.—Suit on a promissory note. Answer, that in purchasing a saw-mill of the plaintiff the defendant agreed to pay off for the plaintiff and deliver to him a certain promissory note described, made by the plaintiff and payable to a third person named; that the defendant was induced so to agree upon the plaintiff's representation that said note to said third person did not bear interest until maturity, upon the truth of which the defendant relied; that said note did, in fact, bear interest from its date, which the plaintiff well knew; that such interest at the maturity of the note amounted to a sum specified, which the defendant paid together with the principal, which sum so paid as interest he asked to set off.

Held, that the answer was good on demurrer.

APPEAL from the Howard Circuit Court.

FRAZER, J.—The complaint in this case was in two paragraphs. 1. On a promissory note for \$250. 2. For work and labor in sawing lumber for the defendant, to the amount of \$810. The answer was in four paragraphs. 1. General denial. 2. That in purchasing a saw-mill of the plaintiff, the defendant agreed to pay off for the plaintiff, and deliver to him, two promissory notes, each for \$1,325, dated January 1st, 1866, and due, respectively, at six and twelve months, made by the plaintiff, and payable to Deloss Root & Co.; that the defendant was induced so to agree by the plaintiff's representation that said notes did not bear interest until maturity, upon the truth of which the defendant relied; that said notes did, in fact, bear interest from their date, which the plaintiff well knew; that such interest, at the maturity of the notes, amounted to \$150, which the defendant paid together with the principal, which sum of one hundred and fifty dollars he asks to set off. 3. That the plaintiff was indebted to the defendant in the sum of two thousand dollars for one-half of a saw-mill, which was to be paid in sawing; that, though requested, the plaintiff has refused to perform the sawing, except to the amount of \$300, which is set up in the first paragraph of the complaint, and the balance, \$1,700, is due the defendant, which he pleads

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as a set-off. 4. Set-off of \$2,000 for one-half of a saw-mill sold by the defendant to the plaintiff. A demurrer was sustained to the second paragraph of the answer, and a reply of general denial was made to the third and fourth.

The ruling below upon the demurrer is presented for consideration. It seems to us that it was erroneous. The facts alleged in that paragraph of the answer, though probably not such as would have enabled Root & Co. to compel the defendant to pay the interest, were, nevertheless, sufficient to establish a payment thereof at the plaintiff's request, and a consequent liability on his part to repay the amount, by virtue of an implied assumpsit. The promise to pay the notes generally included a promise to pay the interest. This promise was procured by the plaintiff. The payment merely followed in fulfilment of the promise. The most that can be said for the plaintiff is, that the promise was not binding, and therefore the payment need not have been made; but this falls far short of supporting the proposition that the payment was voluntary and without the plaintiff's procurement. It would be monstrous in such a state of facts to say that the defendant stands without remedy, like one who as a volunteer has paid the debt of another.

It seems that the note sued on was given for part of the purchase-money of half of a saw-mill sold by the plaintiff to the defendant, the same property having been previously sold by the plaintiff to the defendant, and by the latter to the former again. In the opening testimony, the plaintiff was permitted, over the objection of the defendant for irrelevancy, to put the first and third contracts of sale in evidence. In the state of the issues to be tried, we cannot perceive that this evidence was strictly relevant at that stage of the cause, unless it had become so in consequence of some peculiarity which the case might have at that time assumed by the evidence which preceded it. There was, however, that peculiarity. The plaintiff made use of himself as a witness, to prove the sawing sued for by the second paragraph of the complaint. On cross examination he

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testified, that such sawing was done upon the contract alleged in the third paragraph of the answer, being the second transfer of the mill. On re-examination the evidence objected to was offered and admitted. The theory of the plaintiff was, that all the contracts of transfer, taken together, would tend to show that his contract to saw, upon the resale of the mill to him, was discharged by the contract made when he sold the mill to the defendant the last time, leaving the defendant indebted for whatever had been performed. For that purpose the evidence was, we think, admissible when offered, though certainly it became so only in consequence of the matter elicited by the cross examination.

Judgment reversed, with costs, and cause remanded, with direction to overrule the demurrer to the second paragraph of the answer, &c.

N. Purdum, M. Bell, and D. Moss, for appellant.

N. R. Lindsay and N. P. Richmond, for appellee.

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RECORD.—*Interrogatories.*—*Rejected Pleadings.*—Interrogatories filed by a party to an action, and the answers thereto by the opposite party, and paragraphs of answer to the complaint which are rejected by the court on motion, are not parts of the record if not made so by bill of exceptions.

INTEREST.—*Contract.*—*Remedy.*—Where a person contracts for the payment of a higher rate of interest than can at the time be lawfully contracted for, but the law in force at the time the remedy is sought against him allows parties to contract for the payment of such higher rate, the latter law controls.

APPEAL from the Marion Common Pleas.

GREGORY, J.—The only question presented by the record arises on the action of the court below in sustaining the demurrer to the third paragraph of the answer.

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The interrogatories filed by the plaintiff, the answers thereto by the appellants, and the paragraphs of the answer to the complaint which were rejected by the court below on the motion of the appellee, are no part of the record, not having been made so by bill of exceptions.

The note sued on bears date the 27th day of September, 1866, and is for \$770, payable one year after date.

The paragraph of the answer to which the demurrer was sustained avers, "that as to twenty-eight dollars, the plaintiff charged a greater rate of interest than six per cent., therefore unlawful and usurious; and that the same was included in the note."

The law in force at the time the remedy was sought allowed parties to contract for the payment of any rate of interest not exceeding ten per cent. per annum, and declared the taking of interest in excess of ten per cent. per annum usurious.

The paragraph in question is bad, for not showing any violation of this law.

The judgment is affirmed, with ten per cent. damages and costs.

J. S. Harvey, W. V. Burns, and I. Klingensmith, for appellants.

R. B. & J. S. Duncan, for appellee.

EATON and Another v. BURNS and Another.

PLEADING.—Demand of Judgment.—A complaint upon a note alleged the promise of the defendant by his promissory note to pay the plaintiff a certain sum mentioned, and demanded judgment "for said sum and interest."

Held, that the demand of judgment was sufficiently definite.

SAME.—General Prayer.—A complaint upon a note executed by two makers averred, that one of the makers had died since the execution of the note,

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and his administrator was named and made a defendant with the other maker, and judgment was "claimed also of the assets of said deceased in the hands of said administrator, and plaintiffs pray for general relief."

Held, that though the claim against the assets might not be in form, yet the general prayer included all proper relief.

PROMISSORY NOTE.—*Consideration.*—*Failure of.*—*Award.*—A prosecution for bastardy was submitted to referees whose report recited the submission of "the said prosecution and case of bastardy," the award of a certain sum in instalments, and the execution of certain notes therefor by the father of the child to its mother and her father and guardian; that, in consideration of said notes, the mother acknowledged a sufficient provision for the education and maintenance of the child; and that the father and guardian of said mother, in consideration of the foregoing premises, released and waived all right of action for damages and any and all proceedings for seduction arising out of, or in any way connected with, said case of bastardy.

Held, in a suit on one of said notes, the award being all the evidence in relation to the consideration thereof, that the maker could not claim that such consideration had failed by the death of the child.

PRACTICE.—*Supreme Court.*—*Judgment.*—*Form of.*—No question can be made in the Supreme Court as to the form of a judgment where no objection has been taken below.

APPEAL from the Hendricks Common Pleas.

RAY, J.—This was a complaint by the appellees, upon a note for one hundred dollars, executed by Grandison Eaton and Greenup Eaton to the appellees. The complaint alleges the promise of the appellants by their promissory note to pay the appellees the sum of one hundred dollars, and demands judgment for said sum and interest. It is objected that the sum is not named in the demand. We think the averment sufficiently definite. That is certain which can be made certain. The sum is named, and the date when due, and interest from that date demanded. It is also averred, that said Greenup Eaton has died since the execution of the note, and his administrator is named and made a defendant, and judgment "is claimed also of the assets of said deceased, in the hands of said administrator, and plaintiffs pray for general relief." Though the claim against the assets may not be in form, yet the general prayer includes all proper relief.

There was a joint special answer, that the note was given, with others, upon the compromise of a prosecution for bas-

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tardy commenced at the instance of Margaret J. Burns, one of the plaintiffs, against said Grandison Eaton, which by mutual agreement between said parties was referred to referees, to make their award for the support of said bastard child, which award required the payment of six hundred dollars in instalments; that said note, with others to that amount, was executed with Greenup Eaton as surety; that of said notes so given, two had been paid, amounting to the sum of three hundred dollars, and that they were executed only for the maintenance and education of said child, which had since deceased, whereupon the consideration of the note in suit had failed.

Grandison Eaton also filed a special answer to the same effect.

A reply was filed to each of these answers, denying that the support and education of the child constituted the sole consideration for the execution of the notes, and averring that part of said consideration was, that John A. Burns, a plaintiff in this action and also a payee of said note and the father of said Margaret, would abandon a suit about to be commenced for the seduction of said Margaret. Trial, and finding for the plaintiffs, and judgment over a motion for a new trial.

The report of the referees was introduced on the trial, and recited the submission of "the said prosecution and case of bastardy," and the award of said sum of six hundred dollars, and the execution of the notes, and that in consideration of said notes Margaret J. Burns acknowledged a sufficient provision for the education and maintenance of the child, and John A. Burns, the father and guardian of Margaret, in consideration of the foregoing premises, released and waived all right of action for damages and any and all proceedings for seduction arising out of or in any way connected with said case of bastardy. The death of the child was also proved.

Waiving the question as to the sufficiency of the answers, we examine the appellants' exception. It is objected, that

only the case of bastardy was submitted, and that therefore that formed the only consideration for the notes. But the award, which was all the evidence on that subject, proves otherwise; and while the taking into consideration the release of the right of action by the father and guardian might have avoided the award at the time, yet as appellant did not pursue that course, but accepted the award and received the benefit of the release as part of the consideration of the notes, he cannot now deny the force of the instruments he has executed.

There is also error assigned as to the form of the judgment, but no objection was taken below, and we cannot consider the question as before us. *Bales v. Scott*, 26, Ind. 202.

The judgment is affirmed, with ten per cent. damages and costs.

C. C. Nave, for appellants.

L. M. Campbell, for appellees.

SOWLE v. HOLDRIDGE and Another.

APPEAL from the DeKalb Circuit Court.

RAY, J.—This case comes once more before us for decision. The litigation was commenced by appellant in 1855. Those curious to learn how many indirect roads may be discovered when a plain path lies open, and how far these roads may lead one astray, will find a pleasant study in the written history of this case. For such we cite 17 Ind. 236; 20 Ind. 204; 25 Ind. 119.

The present action was for possession of the real estate described in the contract of the 19th of October, 1858, 25 Ind. 119, and resulted, as all these suits have terminated, in favor of the defendant.

It is argued that Sowle proved in this suit a complete legal

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title to the lands, and that the finding of the jury against him should therefore have been set aside. As his title was, in the opinion of the jury, upon the evidence, nothing but a mortgage, we cannot reverse the judgment, as there are facts which strongly support their verdict.

The appellant however insists that the contract of October, 1858, estops the appellees from disputing his title. When it shall please him to sue in enforcement of that contract, it may properly be held that the parties are estopped from denying that appellant has a title worth the sum contracted to be paid for it. This decides all the points presented by the short argument of the appellant.

Judgment affirmed, with costs.

D. E. Palmer, for appellant.

J. I. Best, for appellees.

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81	394
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THE INDIANAPOLIS, PITTSBURG, AND CLEVELAND RAILROAD
COMPANY v. ALLEN.

COMMON CARRIER.—*Special Contract.*—*Negligence.*—A common carrier cannot contract against liability for loss from his own ordinary negligence. Such a condition is void as against public policy.

SAME.—A contract for the shipment of live stock by a railroad company provided, that, in consideration of a certain reduced rate of transportation, the owner of said stock should assume all risks of injuries which the animals or either of them might receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming and killing themselves or each other, or from delays, or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars of said company, or on account of being injured by the burning of hay, straw, or any other material used by the owner in feeding the stock, or otherwise, and any damage occasioned thereby, and also all risk of any loss or damage which might be sustained by reason of any delay, or from any other cause or thing in or incident to, or from, or in, the loading or unloading of said stock; that said owner should load and unload said stock at his own risk, the railroad company

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furnishing the necessary laborers to assist, under the direction and control of said owner, who should examine for himself all the means used in loading and unloading, to see that they were of sufficient strength, of the right kind, and in good repair and order; that each person riding free to take care and charge of said stock should do so at his own risk of personal injury from whatever cause; and that the owner should release, and hold harmless, and keep indemnified, the railroad company, from all damages, actions, claims, and suits, on account of any and every injury, loss, and damage heretofore referred to, if any should occur or happen. Suit against the railroad company to recover for certain animals shipped by the plaintiff, under this contract, and lost, while in course of transportation, by escaping through a window open in the end of the car in which they had been loaded by the plaintiff's agent, who accompanied them on the route, and who, after the escape of one of the animals, told the conductor to fix said window, and, the conductor not doing so, fixed it himself.

Held, that the railroad company was liable for the loss.

APPEAL from the Marion Civil Circuit Court.

GREGORY, J.—The main question in this case arises on the construction of a contract for freighting stock, made by the parties, under which the appellee shipped six car loads of fat hogs from Indianapolis to Buffalo.

The contract provides, "that whereas said railroad companies transport live stock at only first class rates, as per their tariffs, excepting only in the cases where the owner assumes certain risks and incidents specified below, in consideration of obtaining the transportation at reduced rates; and whereas the said party of the second part, in the present case assumes, and takes upon himself said risks and incidents for said consideration; now, therefore, in consideration that said railroad will transport for the said party live stock at the reduced rate of ——— dollars for single decks and ——— dollars for double decks, per car load, from Indianapolis to Buffalo, and charges advanced, the said party of the second part does hereby agree to take and does hereby assume all and every the risks of injuries which the animals or either of them may receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming and killing themselves or each other, or from delays, or in consequence of heat, suffocation, or the ill effects

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of being crowded upon the cars of said railroad companies, or on account of being injured by the burning of hay, straw, or any other material used by the owner in feeding the stock, or otherwise, and for any damage occasioned thereby; and also all risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to, or from, or in, the loading or unloading said stock. And it is further agreed that the said party of the second part is to load and unload said stock at his own risk, the said railroad companies furnishing the necessary laborers to assist, under the direction and control of the said party of the second part, who will examine for himself all the means used in the loading and unloading, to see that they are of sufficient strength, of the right kind, and in good repair and order. And it is further agreed between the parties hereto that each and every of the persons riding free, to take care and charge of said stock, do so at their own risk of personal injury from whatever cause. And the said party of the second part, for the consideration aforesaid, hereby releases, and agrees to release and to hold harmless and keep indemnified, the said party of the first part, of and from all damages, actions, claims, and suits, on account of any and every injuries, loss, and damages heretofore referred to, if any occurs or happens."

The injury complained of is thus charged in the complaint: "that while said hogs were in the care, custody, and possession of appellants, and while in her cars and upon her said railroad, by reason of the insecure and insufficient doors, shutters, slides, and windows of defendant's cars, and the fastenings thereto, and by reason of the want of care and diligence of defendant in safely keeping, securing, carrying, transporting, and shipping said hogs, six of them escaped from said defendant's cars, through the insufficiency of the fastenings of the doors, shutters, slides, and windows aforesaid, and defendant's negligence."

The second paragraph of the answer sets up the special contract, and that the hogs were loaded and transported in

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pursuance thereof, under the direction and control of the plaintiff, the company furnishing the cars and necessary laborers. A demurrer was sustained to this paragraph of the answer.

A trial was had under the general denial; finding for the plaintiff; motion for a new trial overruled.

The evidence shows that the hogs were shipped under this contract; that they were loaded by an agent of the plaintiff, who accompanied them to Buffalo; that the six hogs probably escaped through a little window that was open at the end of the upper deck of one of the cars; that after the escape of one of the hogs, the agent of the plaintiff told the conductor to fix the window, but he did not do it, and the agent fixed it himself.

It is claimed that under the contract the appellant is not liable for this loss.

In *Lee v. Marsh*, 43 Barb. 102, there was an express stipulation against liability for loss "that may happen from any other cause than the wilful negligence or fraud of said receiver or his agents." In the case at bar there is no such provision. It is true, that the language of the contract is broad enough to cover loss from any cause whatever; but in *The Michigan Southern & Northern Indiana R. R. Co. v. Heaton*, at this term, after a careful examination of the subject, this court came to the conclusion, that a contract as broad in its terms as the one under consideration did not cover liability for loss occasioned by ordinary negligence. Indeed, it is held in that case, that a common carrier can not contract against liability for loss from his own ordinary negligence; that such a condition is void as against public policy.*

*NOTE, by GREGORY, J.—A rehearing was granted in *The Michigan Southern & Northern Indiana R. R. Co. v. Heaton*, *supra*, at the November term, 1869, not, however, on this ruling. The following is the opinion so far as this question is involved:—

It was with great reluctance that the courts of several of our American states at last yielded their assent to the proposition that the strict and severe responsibility which the common law imposes upon a common carrier could

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The railroad company had the exclusive possession and management of the cars in their transit; the shipper was to load and unload, but this did not include the time embraced in operating the train in the course of transportation; during that time, in the very nature of things, the company controlled it. The evidence shows a case of want of ordinary care on the part of the agents of the railroad company. The court committed no error in sustaining the demurrer to the second paragraph of the answer, or in overruling the appellant's motion for a new trial.

Judgment affirmed, with costs.

J. A. Harrison, for appellant.

J. Hanna and F. Knefler, for appellee.

be limited by special contract. *The Camden & Amboy R. R. Co. v. Baldauf*, 16 Penn. St. 67; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344; *Gould v. Hill*, 2 Hill, 623; *Laing v. Colder*, 8 Penn. St. 479; *Atwood v. Reliance Transp. Co.*, 9 Watts, 87. And this regret will be more deeply felt as the business of transporting goods passes more and more into the hands of extensive corporations, controlling vast capital, and, by combinations with each other, virtually destroying competition. The shipper will not be in a position to contract with them on equal terms—he must submit to oppressive conditions, if they choose to impose them, or fail to procure the carriage of his merchandise to market. But if the general question is not now open, and has been so fully settled by judicial decision that the rule *stare decisis* is absolutely controlling, and a remedy is called for by the great public interests of commerce, it must be sought in legislation. We have, however, not now to do with that question necessarily, and we do not propose to ourselves its decision at present.

The language of the contract in the case before us is capable of a very broad construction. It would do no violence to its words, to say that it was intended to exempt the carrier from liability for loss by fire or accident, though such fire or accident were the result of the grossest carelessness on the part of the carrier. But the appellant concedes that such a construction cannot be sustained, for the reason that gross carelessness, under the circumstances, would be fraud, and a contract whereby a party stipulates for immunity for his own fraud is against public policy and will not therefore be tolerated. But why would gross carelessness be fraud? It is the absence of the slightest care. Why should it be fraud, if the parties have contracted for exemption from all care, and have adjusted the compensation accordingly? Shall the carrier be compelled to exercise some degree of care, though he is to receive no compensation for it, and the property has been put into his warehouse upon an express agreement that he need not trouble himself about it at all?

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Must he do more than he has contracted to do, and more than he is paid for doing, to avoid the imputation of fraud? Nay, is fraud ever predicated of a transaction where a contract fairly entered into has been fully and scrupulously performed according to the very intention of both parties to it, and according to its letter? It seems to us that the reason why a carrier may not, because of public policy, stipulate for his own gross carelessness, is a different one, and does not necessarily involve the idea of fraud. The law has a tender care for great public interests, pecuniary as well as moral, and in many cases will hold contracts void because they are plainly in contravention of the public welfare in a mere business aspect. Trade and commerce are objects of this fostering care. Hence a contract never to carry on a particular business, however ample the consideration, is illegal and void. It injuriously affects the public, by depriving it of men's services in departments in which they may be most useful; it discourages industry and enterprise, diminishes the products of ingenuity and skill, prevents competition, enhances prices, and exposes the community to all the evils of monopoly. *Alger v. Thacher*, 19 Pick. 51. But there is no element of fraud in it. And there are other classes of contracts, not needful now to be enumerated, also held illegal and void as being against public policy, merely because their performance would tend to affect injuriously important interests of society. Contracts in general restraint of marriage, and marriage brokerage contracts may be mentioned as examples. Now, the shipper puts his goods in the custody of the carrier, and thereby excludes himself from all opportunity to care for their safety until the transit is terminated. If the carrier do not guard them against spoliation, damage, or destruction, the goods are subject to multiplied hazards; the perils of transportation become a most serious check to the great interests of commerce; and interchanges of commodities between distant sections are rendered precarious and uncertain. Transportation generally, without any care by the carrier for the safety of the goods, would be a tax upon the industry of the country impossible to be estimated. If adopted and maintained as a rule, in a country of such large extent and diversified production as ours, it would ruinously diminish the home value of such of the fruits of industry as must be sent to distant markets, and greatly enhance it to the ultimate consumer, thus operating to the serious detriment of both. But the consequences to the community need not be further dwelt upon. It may be enough to say, that none of the great corporations engaged in the carriage of goods to market would perhaps be willing to publish to shippers, that it is a fact that they give no care whatever to avoid the loss, by fire or accident, of goods confided to them for shipment. It would injuriously affect the business of any one of them, if believed by shippers. Traffic would seek other channels, if others claimed to bestow reasonable care for the safety of their cargoes; nor would low tariffs be deemed enough to induce the exposure of goods to so many probabilities of destruction. It is not quite true, then, that the contract between the shipper and the carrier concerns only themselves, as has been sometimes assumed; it does affect also great public interests most seriously and vitally, and therein

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rests a reason, entirely satisfactory to us, for the conclusion, that the parties are not at liberty to make such a contract as they please.

There is still another reason why, in such a contract, a general exemption of the carrier from the consequences of gross negligence should be held void. Some care on the part of the carrier is absolutely essential to the performance of the contract in any reasonable sense. Property cannot take care of itself; the carrier, during the transit, has exclusive custody and control of it, and he only has the right to give that attention to it without which the chances of its loss and destruction are so imminent that it is not fair to assume that it would have been shipped at all. A condition that no care, or anything less than reasonable care, shall be bestowed upon it, is therefore repugnant to the general intention of the contract, and should be rejected.

Indeed, it was once supposed to be a proposition not liable to be controverted, that a common carrier was, in his relations to society, somewhat different from a private party—that he exercised a sort of public employment, was bound to carry all goods offered for reasonable compensation, and that the law imposed upon him his duties and responsibilities as incident to the character voluntarily assumed. We have seen that the American courts, following those of England, have in many quarters evinced a reluctant tendency wholly to disregard this ancient doctrine. The same disposition in England compelled the timely interposition of Parliament to check it. Here there has been a fortunate hesitancy and doubt, evincing a purpose to refuse to sanction such stipulated exemptions from the carrier's common law liability as would impair the reasonable efficiency of the contract for shipment, and thus defeat its purpose. To dispense with the duty of exercising at least ordinary care for the safety of the goods, would, it is plain, have this effect; and this court, upon the fullest consideration of the subject, finds itself free from all doubt that a condition so repugnant to the general and chief purpose plainly intended by the contract is void, and must be disregarded. The doctrine is elementary and of universal application. The contract for shipment necessarily implies that the carrier shall use some measure of diligence to deliver the goods at the place of their destination. Slight care—the least measure of diligence—is not reasonably sufficient to preserve valuable merchandise from the depredations of thieves, or from destruction by the elements. The plain purpose of the contract of shipment is, to secure the safe transportation and delivery of the goods and it surely is equally plain that a provision in it that the carrier need not make a reasonable effort to accomplish that purpose—such an effort as men of ordinary prudence would make if engaged in transporting their own goods—is destructive of this purpose and intent. And it has accordingly been held, that such a provision, however broad its terms, has only the effect of reducing the liability for negligence of a common carrier to that of a private carrier for hire, who is bound to the use of ordinary care. So the rule was declared by the Supreme Court of the United States, in the *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, the leading American case sustaining such special contracts. It was only the "extraordinary duties annexed to the employment" which it was there held might be dispensed with

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by special contract. The language of the agreement was of the most comprehensive character, expressly declaring that the goods should "be at all times at the exclusive risk" of the shipper, and the carrier "will not in any event be responsible for the loss of any goods." And yet the court held this language: "The owner by entering into the contract virtually agrees that in respect to the particular transaction the carrier is not to be regarded as in the exercise of his public employment, but as a private person who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence." And again, "We think it would be going further than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care," &c. And such was stated to be the result of the English cases. The effect of the case is, that general language, however comprehensive, and however plainly it may declare a purpose to exempt the carrier from every possible risk incident to the shipment, shall nevertheless not be understood to include losses resulting from want of his reasonable care. We know not upon what principle such a construction of the contract in that case could be maintained, save that which we have stated above. See also *Lyon v. Mells*, 5 East, 428. In *Wyld v. Pickford*, 8 M. & W. 442, the contract pleaded provided against the carrier's liability unless the goods were insured according to their value, and paid for at the time of delivery; which had not been done. The question arose upon a demurrer to the plea, and the court, upon a review of the cases, held, that the carrier was liable for ordinary negligence, notwithstanding the contract. The court, per PAKKE, B., said: "But still he undertakes to carry from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods." See, also, *Hinton v. Dibbin*, 2 Q. B. 646; *Story on Bailm.* § 571; *Thomas v. Boston & Prov. R. R.*, 10 Met. 472; *Penn. R. R. Co. v. McCloskey*, 23 Penn. St. 526; *Powell v. Pa. R. R.* 32 *id.* 414; *Welsh v. P. F. W. & C. R. R. Co.* 10 Ohio St. 65. Citations might be multiplied; but we choose to rest our decision of the case before us quite as much upon principle as upon the decided cases. The latter are not uniform, and are incapable of reconciliation. It will be seen from the cases cited, that whether the negligence of the carrier be gross or ordinary, does not, in such a case, affect the question of liability.

Picken and Others v. Whisler.

PICKEN and Others v. WHISLER.

PLEADING.—Promissory Note.—Vendor and Purchaser.—Incumbrance.—Suit by A., the assignee, against B., the maker, upon a note which by its terms was to be paid when B., using due diligence, should collect another certain note given by C. to D., the payee of the note in suit, and assigned by D. to B., the complaint alleging, that the defendant had collected said note on C. Answer in three paragraphs: 1. Admitting the execution of the obligation sued on, but denying that the defendant had collected the C. note. 2. That the husband of the payee of the note in suit was indebted to the defendant in a certain sum mentioned; that the note on C. was given to the defendant in payment of said indebtedness, and the obligation in suit was given for the residue of said note on C. in excess of said indebtedness; that at the maturity of C.'s note he paid thereon to the defendant a sum mentioned, being a certain amount in excess of said indebtedness; that before the commencement of this suit defendant tendered to plaintiff said excess, being less than the note in suit, which plaintiff refused to accept; and that defendant had ever since been ready, &c. 3. That the C. note was given in part consideration for a tract of land sold and conveyed to C. by D., by warranty deed; that D. derived her title to the land from her husband, without consideration; that a judgment rendered in the United States District Court against said husband became a lien on said land while said husband was seized thereof; that C., after maturity of his note, tendered to the defendant, in full payment thereof, a receipt for the balance due on said judgment, from the clerk of said court, and also a tax receipt from the treasurer of the proper county which was filed as a part of the answer; that the residue of the C. note was fully paid to the defendant at maturity; that upon receiving said receipts and said residue, defendant tendered to plaintiff the full amount of the obligation in suit, less the amount of said receipts, which plaintiff refused to accept; and that defendant has ever since been ready, &c. *Held*, that the second paragraph, for failing to deny that C. had paid the whole sum due on his note before the commencement of this action, was bad on demurrer.

Held, also, that the third paragraph, for not averring that the balance of the judgment in the District Court was paid by C., was bad on demurrer; and if regarded as an argumentative denial of the allegation of the complaint, that the defendant had collected the C. note, it might have been struck out on motion, but the proper result having been attained by demurrer, there was no available error.

APPEAL from the Tipton Circuit Court.

This was a suit by Whisler, as assignee, against "Picken & Vandevender," on the following written instrument:

"\$208.00

7th February, 1867.

We promise to pay to Sophia Bowlin, or order, the sum of two hundred and eight dollars, value received, waiving relief from valuation or appraisement laws. To be paid when we collect a note for six hundred dollars, dated January 1st, 1866, given by Francis H. Wheatley to Sophia Bowlin, and assigned by said Sophia Bowlin to us. Due diligence to be used in collecting the same. This note is also given conditional that said Sophia Bowlin pay the costs accrued in the case between us as plaintiffs and Haden Bowlin and Sophia Bowlin defendants, settled at this date by their agreeing to pay all costs.

(Signed.)

PICKEN & VANDEVENDER."

The complaint alleged, that the defendants had collected the note of six hundred dollars referred to, on Wheatley, and that the costs in the case named in the obligation had been fully paid.

The defendants answered in three paragraphs.

The first admits the execution of the obligation sued on, but denies that the defendants have collected the note on Wheatley, referred to in said obligation.

The second paragraph alleges, that one Haden Bowlin, the husband of said Sophia, was indebted to the defendants in the sum of three hundred and ninety-two dollars, and that the note on Wheatley was assigned to them in payment of said indebtedness, and the obligation in suit was given to said Sophia, for the residue of the Wheatley note; that at the maturity of the note on Wheatley, he paid thereon the sum of four hundred and seventy-five dollars and sixty-two cents, being eighty-three dollars more than the indebtedness of Haden Bowlin; and that on the 14th of January, 1868, the defendants tendered to the plaintiff said sum of eighty-three dollars, which he refused to receive; that they have ever since been ready and willing to pay said sum, and bring it into court for the plaintiff, and demand judgment for costs.

The facts set up in the third paragraph are, that the

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Wheatley note was given in part consideration for a tract of land sold and conveyed to Wheatley by said Sophia, by a warranty deed; that she derived her title to the land, without consideration, from her husband, Haden Bowlin, on the 15th of October, 1866; that on the 30th of September, 1865, said Haden Bowlin, with one C. C. Bowlin, became the recognizance bail, in the sum of five hundred dollars, for one Clifton R. Bowlin, for the appearance of the latter at the November term, 1865, of the District Court of the United States, for the District of Indiana, at Indianapolis, to answer the United States on a criminal charge; that said Clifton R. Bowlin failed to appear at the time required, and said recognizance became forfeited, at the November term of said court; that suit was thereupon instituted on said recognizance, and on the 17th of May, 1866, a judgment was recovered thereon, in said District Court of the United States, against said Haden Bowlin and C. C. Bowlin, for the sum of five hundred dollars, and then became a lien on said land; that said C. C. Bowlin was wholly insolvent.

It is also averred, that said Wheatley, after the maturity of his note, "tendered to the defendants, in full payment of his note, a receipt in full of the judgment, from the clerk of said court, for the sum of one hundred and twenty dollars, also one tax receipt from the treasurer of Tipton county for six dollars and eighteen cents," which is filed as a part of the answer; that the residue of said note was fully paid to the defendants at maturity; "that upon the receipt of the receipts aforesaid, and money, the defendants tendered to the plaintiff the full amount of said obligation, on the 15th day of January, 1868, less the receipts for one hundred and twenty-six dollars and eighteen cents, being eighty-three dollars, which he refused to accept;" that the defendants have ever since been ready and willing to pay the same, and bring it into court for him in discharge of said obligation, and pray judgment for costs. A transcript of the proceedings and judgment in the District Court of the United States is filed with the paragraph and made part thereof.

A demurrer was sustained to the second and third paragraphs of the answer, because of their want of sufficient facts to constitute a defense; to which the defendants excepted.

The cause was tried by the court, a jury being waived. The court found for the plaintiff, and rendered judgment in his favor for two hundred and twelve dollars and sixteen cents. A motion for a new trial was made and overruled; and proper exceptions were taken.

ELLIOTT, C. J.—The appellants insist that the Circuit Court erred in sustaining the demurrer to the second and third paragraphs of the answer. The second paragraph is clearly bad. It is averred in the complaint, that the appellants had collected the whole amount due on the Wheatley note. The paragraph admits that Wheatley paid four hundred and seventy-five dollars and sixty-two cents on the note at its maturity, and relies, as a defense to the action, upon a tender of eighty-three dollars before suit, being the excess of the sum so paid, over the amount due the appellants from Haden Bowlin; but it does not deny that Wheatley had paid the whole sum due on his note before the commencement of this suit. If the appellants had collected the full amount of the note on Wheatley before this suit was commenced, the plaintiff below was entitled to recover the amount of the note sued on, and a tender of a less sum could not defeat the action. The paragraph therefore fails to answer the whole cause of action, and the demurrer to it was properly sustained.

We think the third paragraph is also bad. It attempts to show a failure of the consideration, as to a part of the note on Wheatley, by showing that it was given in part consideration for a tract of land formerly owned by Haden Bowlin, the husband of Sophia, and from whom she derived her title, which she conveyed to Wheatley by a deed of warranty, and that a judgment in the District Court of the

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United States against Haden Bowlin, whilst he was seized of the land, became a lien thereon; and it is averred, that Wheatley, after the maturity of his note, tendered to the appellants, in full payment thereof, a receipt of the clerk of said court for one hundred and twenty dollars, the balance due on said judgment, and a tax receipt for six dollars and eighteen cents, and paid the residue of his note to them. This was probably intended as an averment that Wheatley paid one hundred and twenty dollars on the judgment against Haden Bowlin in the District Court of the United States, to discharge the lien on the land; but we cannot give the language so liberal a construction.

The money may have been paid on the judgment by Haden Bowlin, or by C. C. Bowlin, the other judgment debtor, or by Clifton R. Bowlin, the principal in the recognizance, and the receipt therefor be tendered by Wheatley to the appellants. The averment of the tender of the receipt amounts to nothing. The appellants did not sue Wheatley on the note, but took upon themselves the burden of showing that, as to the sum of one hundred and twenty dollars, Wheatley had a valid defense, and a suit would, therefore, have been unavailing. The fact that the judgment was a lien on the land, could not of itself have availed Wheatley as a defense, had he been sued on the note; he must have gone further and have shown that he had paid the judgment to protect his title. The paragraph under consideration contains no sufficient averment of such payment by Wheatley, and we think the court did right in sustaining the demurrer.

The defense attempted to be set up was an unnecessary one, as the issue tendered by the complaint was, that the appellants had collected the whole of the note on Wheatley, and there was no complaint of any neglect in failing to collect it; still, if the paragraph had contained the proper averment of payment by Wheatley of the one hundred and twenty dollars on the judgment against Haden Bowlin, and had thereby shown a valid defense as to that sum, contain-

ing as it does the allegation of a tender of the residue of the note in suit, it would have constituted a good defense to the action.

If the paragraph may be regarded as an argumentative denial that the appellants had collected the whole of the note on Wheatley, still, as another paragraph contains a direct denial of that fact, the third paragraph might have been stricken out on motion; and as the proper result was attained by the demurrer, the judgment would not be reversed for an error in the mode of its accomplishment.

One of the reasons urged for a new trial is, that the finding of the court is contrary to the evidence, and overruling the motion is assigned for error. We think the objection well taken. The case was tried on the appellants denial that they had collected the note on Wheatley. The record contains the evidence, which shows conclusively that the appellants had only received four hundred and seventy-five dollars and sixty-two cents on the Wheatley note, and not the whole amount, as alleged in the complaint. It further shows that Wheatley paid one hundred and twenty dollars on the judgment in the District Court of the United States, and the further sum of six dollars and eighteen cents for taxes, which were a lien on the land at the time he purchased it. He paid the appellants the residue of the note, four hundred and seventy-five dollars and sixty-two cents, and claimed a set-off for the amounts so paid on the judgment against Haden Bowlin and for taxes. The finding, from the evidence, of the issues tried, should have been for the appellants, and hence the court erred in refusing a new trial.

The judgment is reversed; with costs, and the cause remanded for a new trial, with leave to both parties to amend their pleadings.

J. Green, for appellants.

J. W. Robinson, *N. R. Overman*, and *G. W. Lowley*, for appellee.

The Columbus and Indianapolis Central Railway Co. v. Farrell.

THE COLUMBUS AND INDIANAPOLIS CENTRAL RAILWAY COMPANY v. FARRELL.

PRACTICE.—Supreme Court.—Credibility of Witnesses.—Where upon appeal to the Supreme Court the question is one of the credibility of witnesses solely, the action of the lower court will stand.

NEGLIGENCE.—Railroad.—Injury to Passenger.—A railroad train ran beyond the platform for landing passengers at a certain station, and stopped over a culvert, and the proper servants of the railroad company announced the name of the station as a notification to the passengers for that station that the train was there; whereupon a passenger for that station who had paid the company the fare demanded of him, relying on the good faith of the company, alighted upon and into said culvert, without his fault or negligence, supposing he was alighting upon said platform, it being at night and so dark that he could not see that the train had not stopped at said platform; whereby he was greatly injured.

Held, that the company was liable for the injury so received.

SAME.—A railroad company is not legally responsible for the action of persons not its servants in falsely announcing the arrival of a train at a station, whereby a passenger in attempting to alight from the train is injured.

APPEAL from the Marion Civil Circuit Court.

Farrell sued the railroad company, averring in his complaint, that at the time of the injury complained of, the defendant was the owner and operator of the Columbus and Indianapolis Central Railway, extending from Indianapolis to Columbus, and likewise the owner and operator of all the rolling stock used upon said road, and was engaged in the business of common carrier for hire, of passengers and freight upon said road, by means of said rolling stock, and as such admitted the plaintiff into a car and train upon said road as a passenger thereon from Indianapolis to the town and station of Cumberland, in Marion county; that he then and there paid defendant the fare demanded from him by defendant; that by reason of the premises it became the duty of defendant to safely, carefully, and without negligence, carry the plaintiff from Indianapolis to Cumberland and safely, carefully, and without negligence, to land him and allow him to land from said car and train at Cumber-

land; and for that purpose it was the duty of defendant to stop said train and car at, opposite to, and against, the platform at said station; that whenever the train was stopped at and against said platform as it should have been, it was safe for passengers to get out of said car and train so stopped, at any time, whether day or night, said platform being an easy and safe landing from said cars; that when defendant received the plaintiff and undertook as aforesaid to carry him, it was night and dark; that defendant performed her said duty in that behalf so carelessly, that instead of safely and carefully carrying the plaintiff and landing him and suffering him to alight and land at and on said platform, the defendant stopped said train and car near to and over a certain culvert; that it was dark so that the plaintiff could not see that the train was not stopped at said station and platform as it should have been; that being so stopped, defendant announced, and caused to be announced, the station "Cumberland," as a notification to the passengers for that station that the train was there; that the plaintiff, relying on the good faith of the defendant, as he had a right to do, without any fault or negligence on his part whatever, stepped off said car, as he supposed upon the platform, but, in fact, down upon and into said culvert, a distance of twenty feet or more, and by so stepping off into said culvert and falling upon the same, received great, severe, and permanent hurts and injuries, and among others, a severe rupture, resulting in great and permanent hernia; and received such injuries to his brain and spinal column and marrow, as to cause permanent paralysis; and had his eyes injured and put out, whereby he became blind, and still is, of one eye; and was confined to his bed, by reason of said injuries, for a long time, to wit, for one year; and had to pay surgeons' and physicians' bills in a large sum, to wit, five hundred dollars; and was greatly damaged, to wit, in the sum of ten thousand dollars, &c.

The defendant demurred to the complaint, for want of

sufficient facts; the demurrer was overruled, and the defendant excepted.

The defendant then answered by the general denial, and also several special paragraphs upon which no question is made in argument here; and the plaintiff replied by the general denial.

The cause was tried by a jury, who found for the plaintiff, assessing his damages at three thousand dollars, and answered interrogatories.

A motion for a new trial made by the defendant was overruled, and the defendant excepted.

In the instructions to the jury, excepted to by the defendant, was the following:

"If the plaintiff did not alight from the train until it had been fully stopped, nor until the defendant's servants had announced the name of the station or it had been announced from the proper and usual place of making such announcement, he had a right to believe that the train had reached a proper stopping place, and that he could safely alight; and if he did then alight, and did so without knowing the danger of the place, and in consequence of the darkness of the night he had no reasonable opportunity of ascertaining the danger, and he was injured by so alighting, he will be entitled to a verdict. * * * If at the stopping of the train an announcement of the station was made at and from the point on the train where announcements were commonly and properly made, so as to be heard by the plaintiff, then the plaintiff had, from that, a right to believe that the train was at a proper and safe landing place; and if he stepped off, after the stopping of the train, without fault on his part, and received injury, then he would be entitled to recover. But if the announcement was made by a person not a servant of the company, and from a place not the usual and proper place on the car for making such announcement, or was the mere talk of the passengers upon the train, and was not within the knowledge of the defendant's servants, then the act of plaintiff in stepping off the train in an unsafe place would

not be caused by any fault or negligence of the defendant; and in such event the plaintiff would not be entitled to recover."

FRAZER, J.—We cannot reverse this judgment upon the evidence, as we are earnestly pressed to do. As it appears upon paper it creates a decided impression that the verdict was wrong. But that depends upon the credit due to the witnesses; and it may be if they had been examined in our personal presence as they were before the jury which found the verdict and the judge who overruled the motion for a new trial, that we would have thought otherwise. There are tests of truth in testimony impossible to be put into a bill of exceptions; and it is therefore wise that where the question is one of credibility only, the action of the lower court should stand.

The instruction to the jury, to the effect that the railroad company was legally responsible for the action of persons not its servants, in falsely announcing the arrival of the train at the station, whereby the plaintiff in attempting to disembark was injured, was not, in our judgment, a correct statement of the law. But this error was clearly harmless. The jury found, in answer to an interrogatory, that the announcement was, in fact, made by the proper servants of the defendant.

We think that the complaint was good.

The judgment is affirmed, with costs.

J. L. Ketcham, J. L. Mitchell, and W. A. Ketcham, for appellant.

M. M. Ray, J. W. Gordon, and W. March, for appellee.

Burrows v. Holderman and Another.

BURROWS v. HOLDERMAN and Another.

PRACTICE.—*Demurrer.—Misjoinder of Causes.*—Complaint to recover the possession of certain real estate held by the defendant as tenant of the plaintiff, for non-payment, upon ten days' notice, of rent due, and also for the rent unpaid, in one paragraph. Finding, that the plaintiff was not entitled to the possession of the premises, and that the defendant was indebted to the plaintiff in a certain sum. Judgment for the sum found due.

Held, that if two causes of action were improperly joined, the only method to reach that error was by demurrer.

Held, also, that this court can in no case reverse a judgment for this error.

APPEAL from the Marion Civil Circuit Court.

RAY, J.—This cause was commenced before a justice of the peace and appealed to the circuit court. The complaint is as follows:—

“Henry Holderman and Isaac Boone complain of G. W. Burrows, and say that said defendant as tenant of plaintiff occupied certain real estate under a written lease filed herewith and made part hereof, and containing a description of said real estate; and said Burrows has failed to pay the rents due under said lease, and is now indebted to said plaintiff in the sum of three hundred and twenty-five dollars for said rent; and that on the 1st day of July, 1867, they caused a notice to be served on said Burrows, which, together with the return thereon, is filed herewith and made part hereof, demanding possession of said premises within ten days from that time, if the rents should not be paid; said defendant has failed to pay said rent and refused to deliver up possession of said premises; wherefore plaintiffs pray judgment for possession of said premises, and for two hundred dollars damages for non-payment of rent, and for all proper relief.”

To this a denial was filed. Trial by the court, and a finding that the plaintiff was not entitled to the possession of the premises, and that the defendant was indebted to the plaintiff in the sum of one hundred and twelve dollars and fifty cents, rent to July 1st, 1867.

The defendant moved for a new trial. The only reason

assigned, which is argued in this court, is, that the finding is against the law and the evidence. The motion was overruled, and judgment rendered for the sum found due.

It is insisted, that the action is brought under the provision of the "act concerning the unlawful detention of lands and the recovery thereof," 2 G. & H. 630; and that section 1 of that act only authorizes a recovery of damages for the detention when the landlord is entitled to the possession of the lands; and as the court finds he is not entitled to such possession in this case, there can therefore be no recovery here.

There was no motion made to separate the two causes of action. There was no demurrer for misjoinder of causes of action.

The section already cited authorizes the suit for the recovery of the lands, and also provides for the recovery at the same time of damages for the detention.

This action is not for damages for the detention, but for rent unpaid.

The "act containing several provisions regarding landlords, tenants, lessors, and lessees," 2 G. & H. 358, provides, in section 17, that "rents from lands are collected as other debts."

If these two causes of action were improperly joined, the only method to reach that error was by demurrer. We can in no case reverse a judgment for this error. 2 G. & H. 81, sec. 52.

Judgment affirmed, with costs and ten per cent. damages.

E. W. Kimball, for appellant.

J. T. Dye and *A. C. Harris*, for appellees.

Foy and Others v. Reddick.

FOY and Others v. REDDICK.

REFLEVIN.—House Treated as Personalty.—Trust.—A., being the owner of a certain town lot on which was a dwelling house, built another house adjoining the former and permanently attached thereto, but standing in a street of the town, though he supposed that it was upon a lot. Becoming financially embarrassed, he fled the country; and an execution was issued on a judgment which had been rendered against him in favor of B., by virtue of which the sheriff levied on and sold said house in the street as personal property, C. being in possession thereof at the time of the sale. Afterwards, the agent of B., who had bid off the property for B., informed C., that by B.'s direction he would let C. have the house for A. if C. would pay the amount it had been bid off at, and also pay said agent a small debt that A. owed him. C. thereupon wrote to A., stating the proposition made by said agent, and offering to furnish the money and buy the house for A.'s benefit. A. replied, advising C. to buy the property and sell it again, pay himself out of the proceeds, and apply the balance to the payment of A.'s debts. Subsequently, C., being the owner of the lot, purchased the house of said agent, paying him therefor the amount the agent had bid for it and a certain sum for back rent, C. furnishing the money, which A. never refunded or offered to refund. C. continued to occupy the house, always claiming it as his own, till his death, when his sole heir sold the lot and the house in the street, by two separate and distinct sales, to D. Suit by A. against D. to recover possession of the house in the street as personal property, the above facts appearing in evidence, but there being no written evidence of title to the lot in C. or D.

Held, that, in the absence of a conveyance to C., in terms sufficiently comprehensive to cover the house as appurtenant to the lot, it was reasonable to presume that it was properly treated by the parties as personalty.

Held, also, that there was no trust in favor of A.

Held, also, that a subsisting indebtedness of C. to A. growing out of a partnership which had existed between them long prior to the purchase of the house by the former, could not be deemed a refunding by A. of the money paid by C. for the house.

APPEAL from the Pulaski Common Pleas.

ELLIOTT, C. J.—This was a suit by Reddick against Caroline Foy and others, to recover the possession of a house as personal property, situate in a street in the town of Winamac.

An answer was filed, containing the general denial, and

another paragraph which it is not necessary to notice, as no question arises upon it in this court.

A jury being waived, the case was tried by the court, resulting in a finding and judgment for the plaintiff. A motion for a new trial was filed and overruled.

The only question presented here, which need be noticed, is, as to the sufficiency of the evidence to sustain the finding of the court.

The evidence shows that, in 1858, Reddick was the owner of lot twenty-seven in Winamac, which was bounded on the north by Spring street. On the north-west corner of the lot was situate a dwelling-house, and Reddick, in 1858, built the house in controversy, which adjoins, and is permanently attached to, the house on lot twenty-seven, extending therefrom north, but stands in Spring street, and is described as a double story-and-a-half house.

One Selders subsequently became the owner of lot twenty-seven. Reddick became embarrassed, and, using his own language, left the country "prematurely." A judgment had been rendered against him in the Pulaski Circuit Court, in March, 1857, in favor of one Walker. In 1861, after Reddick had left the State, an execution was issued on Walker's judgment, by virtue of which the sheriff levied on and sold the house in controversy, as personal property. Walker became the purchaser. Selders was in possession of the house at the time of the sale. Some time after the sale, one Lane, the agent of Walker, who had bid off the property for him, informed Selders, that by Walker's direction he would let him have the house for Reddick, if he, Selders, would pay the amount it was bid off at, and pay Lane a debt of about thirty-two dollars that Reddick owed him. Selders thereupon wrote to Reddick, stating the offer made by Lane. Reddick replied, advising Selders to buy the property, and then sell it again, pay himself out of the proceeds, and apply the balance to the payment of Reddick's "honest debts."

Selders afterwards purchased the house of Lane, and paid

him the amount that he had bid for it at the sheriff's sale and ten dollars for back rent. Selders continued to occupy the house until his death, in 1864. He died without issue, leaving his widow the sole heir to his estate, who afterwards sold lot twenty-seven, and also the house in controversy, to the defendants Caroline Foy and her sister, Mary Conn. Reddick, when he built the house, did not know that he was building it in the street, but "supposed it was on a lot." He did not furnish Selders any money with which to make the purchase of Lane. Selders furnished the money himself, and ever afterwards claimed the house as his own. Reddick admitted, on the trial, that he never refunded, or offered to refund, the amount paid by Selders for the property, but at the same time testified, that he and Selders had been in partnership, and he had paid Selders otherwise, before he, Reddick, left Winamac, and that "Selders was fully paid the amount he advanced to Lane."

The first ground upon which the appellants claim a reversal of the judgment is, that the evidence shows that the house in controversy is real, and not personal, property, and hence replevin will not lie for its recovery. This position can only be maintained upon the hypothesis that it forms a part of the house on lot twenty-seven, and is therefore appurtenant to that lot. The evidence before us, however, is not sufficient to warrant such a conclusion.

It does not show any deed of conveyance, or other written evidence of title to lot twenty-seven, either to Selders or the appellants. It was shown on the trial, by parol evidence, that Selders owned the lot at the time he purchased the house of Lane, and at the time of his death; but it was sold by the sheriff as personal property, and Selders purchased it as such from Lane. And although the appellants purchased both the lot and the house of Selders' widow, yet they were two separate and distinct purchases. Indeed, the house, since 1861, seems to have been treated by all the parties as personal property, and not as appurtenant to lot

twenty-seven; and, in the absence of a conveyance of the lot to Selders, in terms sufficiently comprehensive to cover the house as appurtenant to the lot, it is but reasonable to presume that it was properly treated as personalty. Regarding it, then, as personal property, it remains to be determined whether the evidence justifies the finding of the court that Reddick was the owner of it. We do not think it does. The legality of the sheriff's sale is not controverted by Reddick. On the contrary, he claims title under it, and bases his right to recover on the assumption that Selders purchased it as his trustee and held it for him in trust, and that the right of property, as well as the right of possession, thereby vested in him. It may, perhaps, be inferred from the evidence, that Selders, at the time of the purchase, intended to let Reddick have the benefit of it, but he was under no legal obligation to do so. Reddick had no legal claim to the property. He did not furnish Selders the means to pay for it, and Selders was under no legal obligation to furnish them for his benefit. Selders bought the house and paid for it with his own money, and ever afterwards, so far as the evidence shows, claimed title in himself. He was not, in any legal sense, the trustee of Reddick in making the purchase, nor does a trust arise by implication of law from the facts under which it was made.

It may be properly remarked, in this connection, that when Selders wrote to Reddick, informing him of the offer of Lane, he did offer to furnish the money and buy the house for Reddick's benefit. The statement of Reddick, that Selders was fully repaid, amounts to nothing. It is simply a claim that he and Selders, long prior to the purchase of the house, had been partners in business, with an intimation that Selders was, in some way, indebted to him. But if such an indebtedness exists, it cannot be deemed a refunding of the money paid by Selders for the house, or in any way affect the merits of the question.

We think the court erred in refusing a new trial.

Morehead v. Murray and Another.

Judgment reversed, with costs, and the cause remanded for a new trial.

G. T. Wickersham, S. E. Perkins, L. Jordan, and S. E. Perkins, Jr., for appellants.

D. P. Baldwin, for appellee.

MOREHEAD v. MURRAY and Another.

CONTRACT.—*Consideration.*—*Failure of.*—*Sale.*—Suit on a note. Answer, that the defendant bought of the payee a certain number of fruit trees; that it was agreed by them that said trees should be in good condition, and that if any of them should not grow, the seller would replace them with other good trees; that on the day the note was given (in November), the seller delivered said trees, and represented them to be as provided for by said contract; that the defendant, not being experienced in the nursery business, believing the trees to be as represented, in consideration thereof, executed the note, and properly set out the trees; that the same were not in good condition, but were wilted, and in bad condition, and *wholly worthless*; that defendant did not and could not know their condition till long after the note was executed; that they did not grow, of which the seller had notice on the 1st day of the next June; yet he had wholly failed to replace them. *Held*, that the answer was good on demurrer.

SAME.—*Evidence.*—The trees were delivered to the buyer upon his written order directed to the seller, for certain trees at specified prices.

Held, that parol evidence was admissible to prove an agreement of the parties at the time of making said order, that the seller should replace any of the trees that might not grow.

PRINCIPAL AND AGENT.—*Declarations.*—As steps in proving the authority of one as an agent in the transaction in controversy, evidence of his similar transactions with different persons and of his declarations therein was held admissible.

APPEAL from the Knox Circuit Court.

Suit by Morehead against Murray and Prather on two promissory notes bearing the same date, one for one hun-

dred dollars, and the other for two hundred dollars, executed by the defendants to Miller, Swan & Co., and assigned by indorsement by the payees to the plaintiff.

Answer, in two paragraphs: first, the general denial; second, that on the day of the date of the notes sued on, November 8th, 1865, defendant Murray bought of Miller, Swan & Co. five hundred fruit trees and three hundred and ten grape vines, which it was agreed by them should be thrifty and in good order and condition, and that if any trees or grape vines should not grow, said Miller, Swan & Co. would replace them with other good trees and grape vines; that on the day aforesaid, Miller, Swan & Co. did deliver to defendant Murray five hundred fruit trees and three hundred and ten grape vines, and represented them to be as provided for by said agreement; and the defendants, not being experienced in the nursery business, and believing the trees and vines to be as represented, in consideration of said trees and vines, executed the notes sued on, said Murray as principal and said Prather as surety; that defendant Murray set out said trees and vines in the full belief that they were as represented, and thereby incurred great expense, to wit, one hundred dollars; that said trees and vines were not in good condition, but, on the contrary, were wilted, and in bad condition, and wholly worthless; that defendant Murray did not and could not know the condition of said trees and vines until long after the notes sued on were executed; that said trees and vines were properly set out, and yet they did not grow, of which said Miller, Swan & Co. had notice on the 1st day of June, 1866; yet they have wholly failed to replace said trees and vines; wherefore defendants say that the consideration of said notes has wholly failed.

A demurrer to the second paragraph of the answer was overruled, and the plaintiff excepted.

The plaintiff replied by the general denial.

The court tried the cause without a jury, and found for the plaintiff in the sum of \$42.02. A motion by the plaintiff for a new trial was overruled, the plaintiff excepting,

Morehead v. Murray and Another.

and judgment was rendered against the defendant for said sum and costs.

On the trial, the defendants, having read in evidence an order to Miller, Swan & Co., signed by "Rockwell, agent," for the trees and vines at specified prices, to be delivered to Murray, offered to read a memorandum on the back thereof, in pencil, not signed and partly erased, as follows: "If any of the trees and vines do not grow, then, in that event,"—the remaining part of the memorandum being unintelligible. The plaintiff objected to the introduction of this memorandum, but the court allowed it to be read, and also, over the plaintiff's objection, permitted the defendants to prove by Murray that the agent of Miller, Swan & Co. agreed to replace any trees and vines, delivered under the contract, which might not grow, with other trees and vines; that said memorandum was in the handwriting of Rockwell, the agent of Miller, Swan & Co. and was made by said Rockwell as such agent immediately after an order for the trees and vines, signed by Murray and Rockwell, was given to said Rockwell; and that said memorandum was delivered by Rockwell to Murray as a statement of what the agreement was as to replacing trees and vines which did not grow.

One Hilderman testified, over the plaintiff's objection, that a short time before the contract with Murray, he, the witness, gave an order to Miller, Swan & Co., through their agent, Rockwell, for trees and vines, and that Rockwell said he expected to take an order from Murray for trees and vines on the same terms and conditions that he sold to witness; that the contract of Miller, Swan & Co. with witness was in writing, and its terms and conditions were, that the trees and vines were to be in good condition, and if any of them did not grow, Miller, Swan & Co. would replace them with other trees and vines.

One Anther testified, over the plaintiff's objection, that the trees and vines which he, the witness, received from

Miller, Swan & Co. about the same time that Murray received his, did not grow, but most of them died.

RAY, J.—There was no error in overruling the demurrer to the second paragraph of the answer. It denied that the trees and vines were of any value whatever.

There was no error in allowing parol evidence of the memorandum on the back of the order. It was not a contract, but a simple memorandum, and proper for the witness to use to refresh his memory, but it should not have been introduced in evidence as a paper. As there was nothing in it of substance, however, this error cannot work a reversal. As to the objection to the proof of an agreement to replace the trees which should not grow, as being in contradiction to the order for the trees, there is no force in it. The order was not a contract binding both parties, but simply an order, which required the person sending it to accept the articles ordered. An agreement to replace any defective trees would not conflict with this written direction.

The evidence of the witness Hilderman, as to the terms on which Rockwell sold trees to the defendant or to others, was not proper as proof of the contract in this case. It was not part of the *res gestæ*. *Hynds v. Hays*, 25 Ind. 31. The agency not being proved, it could not bind the principal. Nor was the evidence of the witness Anther, that his trees did not grow, admissible, standing alone. But all this evidence was proper as steps in proving the authority of the agent; it would have been made complete by showing the recognition by Miller, Swan & Co. of similar contracts.

As the court should have charged the jury what effect to give to all this evidence, and as the charges given are not presented by the bill of exceptions, we must presume in favor of the action of the court.

The judgment is affirmed, with costs.

W. B. Robinson, J. M. Boyle, J. C. Denny, and G. G. Reily, for appellant.

Teagarden v. Graham and Others.

TEAGARDEN v. GRAHAM AND OTHERS.

ARREST.—*Justification.*—*Military Order.*—*Evidence.*—A sergeant of volunteers in the army of the United States in the last war, having received a written order from the proper military authorities to arrest certain deserters, in this State, and any others of that class, and all persons who should interfere with such arrests, made the arrest of said deserters at night; and the party having them in charge, under command of said sergeant, was fired upon from a wood, not far from the residence of one A., who was treasurer of a treasonable organization, the object of which was the protection of deserters, and who had been fined in the United States Court upon a plea of guilty to an indictment for harboring deserters. Upon the fire being returned, the assailants fled, and the soldiers, after proceeding a short distance, about three or four o'clock in the morning and before daylight, discovered A. crossing the road from the direction in which the firing had occurred, and halted and searched him, finding nothing but a part of a box of caps, though he subsequently stated that he dropped a revolver when he stopped. He seemed fatigued, and was "puffing and blowing." He was thereupon arrested and secured with ropes by the soldiers under command of said sergeant, and taken by them beyond the county, to the military headquarters of the district, where he was discharged by the provost marshal, after a short detention. Suit by A. for damages, against said sergeant and those under his command.

Held, that the written order for the arrest of the deserters having been shown to be lost, evidence of its contents was admissible.

Held, also, that the defendants were justified.

APPEAL from the Vermillion Circuit Court.

RAY, J.—The complaint is as follows:—

"The plaintiff complains of the defendants, and says that the said defendants with force and arms assaulted the said plaintiff, to wit, at the county of Fountain and State aforesaid, on or about the 28th of February, 1864, and then and there seized and laid hold of the said plaintiff, and then and there, with great force and violence, pulled and dragged about the said plaintiff, and then and there forced and compelled the said plaintiff to go off and from his said premises, near to his own dwelling-house, in the county aforesaid, and forced and compelled him to go in and through the woods, in the night time, to a certain place in said county known as Steam Corners, and then and there tied and bound the

said plaintiff with ropes, bandaging his arms behind him, the said plaintiff; and then and there the said defendants Barton W. Graham and Mitchell Conover, with force and arms, forced and compelled the said plaintiff to go from and out of said county, to the city of Lafayette, in the county of Tippecanoe, in the said State of Indiana, when and where he was kept and detained in prison, without any reasonable or probable cause whatever, for a long space of time, to wit, for the space of twenty-four hours next following, contrary to the law and customs of the State and against the will of the plaintiff, whereby the plaintiff was then and there not only greatly hurt, bruised, and wounded, but was also then and there greatly exposed and injured in his credit and in, to wit, in the sum of five thousand dollars; wherefore the plaintiff demands judgment for five thousand dollars and other relief."

On the trial, there was proof that Graham was a sergeant in the 63d Regiment of Indiana Volunteers, in the service of the United States; that said Graham was sent home to recruit for his regiment in the field during the war, and was ordered to arrest deserters and all who should interfere with such arrests; that he made such an arrest at night, and while passing through a wood, not far from the plaintiff's residence, the party having the deserters in charge was fired upon from the woods, and upon returning the fire, the assailants fled; that, proceeding a short distance, the soldiers discovered the plaintiff crossing the road from the direction where the firing had occurred, to a neighbor's house; he was halted and searched, and nothing was found but a part of a box of caps, though a witness testified to the plaintiff's subsequent statement, as the witness remembered it, that he dropped a revolver when he stopped; that the plaintiff seemed to be fatigued, and he "was puffing and blowing." It was also testified, that the plaintiff was treasurer of a treasonable organization, whose object was the protection of deserters, and that plaintiff had been indicted in the United States Court, and had pleaded guilty to a charge of harboring

deserters, and had been fined therefor. The time of his arrest was about three or four o'clock in the morning and before daylight. The defendant Graham stated, that he received a written order from the proper military authorities, directing him to arrest the deserters whom he had seized, and any others of that class, and also to arrest all persons attempting to interfere with such arrests. The plaintiff was fastened with ropes and taken to Lafayette, where he was discharged by the provost marshal, after a short detention.

There was an objection, on the trial, to the evidence of the contents of the order for the arrest of the deserters, but as the written order was shown to have been lost, the evidence was properly admitted.

There was a finding for the defendants.

The motion for a new trial is on the ground that the evidence does not sustain the verdict.

The law, as stated by Allen, in his work on the duties and liabilities of sheriffs, p. 61, is, that "if an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested." It was so held in *Holley v. Mix*, 3 Wend. 350. See, also, 1 Chit. Crim. Law, 15.

In this case there had been a felony committed in the presence of an officer in the service of the United States; and that officer was authorized by an order from his superior officer, who derived his authority from the President of the United States, as Commander in Chief of the army, to arrest any one interfering with the exercise of his authority and take him before the nearest military authority. The officer and those under his command were simply intending, in good faith, to obey this order; for there was evidence enough to show a strong probability that the plaintiff had so interfered.

By the fourth section of the act of March 3d, 1863, U. S. Stat. at Large, vol. 12, p. 756, Congress has expressly recognized the binding force of such orders, under the au-

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thority of the President, and declared that they shall constitute a full defense for any act done under them. The arrest in this case would have been justified if made by any person, without authority, and we are not prepared to hold the removal from the county to the military headquarters of the district an act rendering the officer or those under his command liable to an action for damages. The Supreme Court of the United States have the power to declare this act of Congress unconstitutional; we shall not anticipate such action upon any ground pointed out by appellant or that suggests itself to us.

Judgment affirmed, with costs.

J. Ristine, for appellant.

W. H. Mallory and *B. E. Rhoads*, for appellees.

REED v. BAKER, Governor.

COURT OF COMMON PLEAS.—*Alteration of Districts.—Vacancy.—Election.—Statute Construed.*—By act of 1859 (2 G. & H. 20, sec. 3), the counties of Tippecanoe, Benton, White, and Carrol, were made a common pleas district, in which it was required that a judge should be elected on the second Tuesday of October, 1860, and every fourth year thereafter. By act of 1861 (2 G. & H. 653), this district was required to be designated and known as the fifteenth district. By act of 1867 (Acts 1867, p. 92), the twenty-third district was created, consisting of the counties of Tippecanoe and Warren, and it was enacted that the then elected judge of the fifteenth district should be, and perform the duties of, judge of the twenty-third district, until the expiration of his term of office.

Held, that by said act of 1867, the remaining counties, White, Benton, and Carrol, did not cease to be the fifteenth district, but a vacancy was thereby created on its bench, to be filled by appointment by the Governor till the general election of 1867, then by election for the unexpired term, till October, 1868, when a judge of that district was required to be elected.

APPEAL from the Marion Civil Circuit Court.

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FRAZER, J.—The case before us involves, in its merits, but a single question, and as the parties interested desire that it alone shall be considered, we address ourselves at once to its solution.

At the October election, in 1868, Hon. Alfred Reed, the appellant, was elected judge of the fifteenth common pleas district, and the question is, whether such election could lawfully take place at that time.

By the act of 1859 (2 G. & H. 20, sec. 3), the counties of Tippecanoe, Benton, White, and Carrol, were made a common pleas district, in which it was required that a judge should be elected on the second Tuesday of October, 1860, and every fourth year thereafter. By the act of March 11th, 1861 (2 G. & H. 653), this district was required to be designated and known as the fifteenth district. By an act approved March 11th, 1867 (Acts 1867, p. 92), the twenty-third district was created, consisting of the counties of Tippecanoe and Warren, and it was enacted that the then judge of the fifteenth district should be, and perform the duties of, judge of the new district, until the expiration of his term of office.

So, inasmuch as under our Constitution one man cannot lawfully be the incumbent of two offices at the same time, a vacancy was created upon the bench of the old district, and it was the duty of the Governor to fill that vacancy by appointment until the next general election, which would be in October, 1867. So is the statute, 2 G. & H. 19, sec. 2. At that election a judge would be elected merely for the unexpired term. So again is the statute, expressly. 1 G. & H. 672, sec. 7. The office being created by statute, it is quite plain that the enactment last referred to is within the scope of legislative authority.

The conclusion would seem to follow, that the law of 1859 required to be elected in October, 1868, a common pleas judge for the counties of White, Benton, and Carroll, unless by the creation of the twenty-third district, in 1867, the

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counties remaining of the former fifteenth district ceased to be the old district. We are unable to perceive how such effect can properly be given to the act of 1867. There is nothing in its terms requiring it, or necessarily or reasonably implying it. No good reason is apparent requiring such legislation, and there are many to warrant the conclusion that nothing of the sort was intended. In 1861, the legislature adopted the plan of designating common pleas districts by numbers, following a custom which had prevailed as to circuits since the organization of this State. That plan has since been pursued in every instance where an additional district has been created—it was so by the very act of 1867, creating a new district to be composed of the counties of Tippecanoe and Warren and numbering it the twenty-third. It would be strange if the legislature designed, by that very act, to take from another district its designation and its identity, and make it a new district with no designation whatever.

The argument, carried to its utmost result, would establish only the destruction of the fifteenth district as designated in 1861, without making any provision for the court in the counties of White, Benton, and Carroll. The act of 1867 has no terms which can be construed into the creation of a new district composed of those counties. If it destroys the old district by implication and repeal, as is argued, it undoubtedly stops there, and the embarrassing question would at once arise, whether all the acts of the court of common pleas in those counties since 1867 are not *coram non judice* and void.

There is a plain escape from these embarrassments. The purpose of the legislature was, not to destroy the fifteenth district, nor to affect it in any way whatever, save to lessen its boundaries, by cutting off Tippecanoe county from it, and to create a vacancy upon its bench, by assigning its judge to a new district, in which, perhaps, he happened to reside. This is the fair construction of the language of the act of

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1867, effectuates fully all the purposes of that act, and avoids all confusion and embarrassment.

Judgment reversed, and cause remanded, with direction to overrule the demurrer.

A. Reed, S. A. Huff, and B. W. Langdon, for appellant.

S. E. Perkins, S. E. Perkins, Jr., D. D. Pratt, and Z. Baird, for appellee.

CASES
ARGUED AND DETERMINED
 IN THE
SUPREME COURT OF JUDICATURE
 OF THE
STATE OF INDIANA,
 AT INDIANAPOLIS, NOVEMBER TERM, 1869, IN THE FIFTY-FOURTH
 YEAR OF THE STATE.

31	429
129	57
31	429
161	568
151	570
31	429
1171	629

DOUGLASS *v.* THE STATE, on the Relation of WRIGHT.

OFFICE.—Vacancy.—County Auditor.—Statute Construed.—Where a vacancy in the office of county auditor is filled by appointment, and a successor is elected at the next general election, such successor is entitled, by section 4 of the act of May 13th, 1852 (1 G. & H. 671), to take the office as soon after his election as he shall have qualified.

SAME.—Usurpation.—Damages.—Measure of.—If such appointee refuses to surrender the office upon the demand of such qualified successor, the latter is entitled to recover from the former the gross emoluments of the office received by him while so unlawfully withholding the office.

SAME.—At the October election, 1863, A. was elected auditor of a certain county, was commissioned, and, having duly qualified, went into said office November 1st, 1863. He resigned in December, 1866, and B. was appointed by the board of county commissioners to fill the vacancy. At the October election, 1867, C. was elected to the office, and was subsequently commissioned for four years from the 1st of November, 1867; and, having duly qualified, on the 11th of November, 1867, he demanded of B. possession of the office, its records, &c., which B. refused to surrender, claiming the right to hold till the first Monday of March, 1868. Information under the statute, on the relation of C. against B., pending which, on the first Monday of March, 1868, B. surrendered to C.

Held, that C. was entitled to the office when he so demanded possession of it, and to receive its fees and emoluments from that date.

Held, also, that B. was not entitled to retain from the gross emoluments of the office for the time he so unlawfully held it against C. the amount paid out for necessary clerk hire for discharging the duties of the office for that period.

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Held, also, that section 1 of the act of May 31st, 1852 (1 G. & H. 122), so far as it fixed the commencement of the county auditor's term of office on the first Monday of March next ensuing his election, was intended to apply to a regular succession of terms by election, and was repealed by implication by the act of March 3d, 1855 (Acts 1855, p. 52), providing, that the term of office of the auditor and certain other officers "shall commence on the first Monday of the month of November, immediately following the general October elections, and that any of the above named officers to be elected hereafter shall hold their offices until the first Monday of November aforesaid, according to their respective terms."

Held, also, that, in such a case as this, said act of March 3d, 1855, is not in conflict with section 2 of article 6 of the State Constitution. *Howard v. The State*, 10 Ind. 99, explained.

APPEAL from the Harrison Circuit Court.

This was an information under the statute, in the name of the State, on the relation of Samuel J. Wright, against Benjamin P. Douglass, filed on the 16th day of November, 1867. It was alleged in the information, that Wright, the relator, at the October election, in the year 1867, was duly elected to the office of Auditor of Harrison county, Indiana, that he was subsequently duly commissioned as such, by the Governor, for the term of four years from the first day of November, 1867, and until his successor should be elected and qualified; that he executed a bond in the sum of two thousand dollars, with sureties, which was accepted and approved by the board of commissioners of said county; that he took the proper oath of office, and on the 11th of November, 1867, demanded the possession of the office, and the records, books, and papers belonging thereto, of said Douglass, who was then in possession thereof; that said Douglass refused to deliver or surrender said office to the relator, but continued unlawfully to usurp, hold, and exercise the same, to the damage of the relator in the sum of fifteen hundred dollars.

A demurrer filed to the information was overruled. An issue was then formed by the general denial, which, by agreement of the parties, was tried by the court.

There was a finding for the relator, and judgment for

six hundred dollars in damages. A motion for a new trial was made and overruled.

The material facts presented in the case are these: At the October election, 1863, one James S. Miller was elected auditor of said county, for the term of four years from the first day of November of the same year. He was so commissioned, and, having duly qualified, went into office on said 1st day of November, 1863. On the 9th of December, 1866, Miller resigned the office, and on the same day Douglass, the appellant, was appointed by the board of commissioners to fill the vacancy and serve as auditor until a successor should be elected and qualified. Wright, the relator, was elected such successor at the October election, 1867. He was subsequently commissioned for the term of four years from the 1st of November, 1867, and, after having duly qualified, by giving bond with sureties, which was approved by the board of commissioners, and taking the proper oath of office, on the 11th of November, 1867, he demanded possession of the office and of all the records, books, and papers, belonging thereto, of the appellant, who refused to surrender the same, claiming that he was entitled under his appointment to hold the office until the first Monday of March, 1868. Douglass, accordingly, continued to hold the office and exercise the franchises thereof until the first Monday in March, 1868, at which time, pending this suit, he surrendered to Wright.

It was agreed by the parties in the court below, that the emoluments of the office from November 11th, 1867, to the first Monday in March, 1868, were six hundred dollars; "and the amount of necessary clerk hire, paid out by said Douglass, for discharging the duties of said office from November 12th, 1867, to the first Monday in March, 1868, was \$266.66; and that defendant will be entitled to a deduction of that amount, if the court shall hold that such a deduction is admissible in law as a counter-claim."

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ELLIOTT, J.—The questions presented in the case, and discussed by counsel, are,

First. Was Wright entitled to the office before the first Monday in March, 1868?

Second. If Wright was entitled to the office on the 11th of November, 1867, when he demanded possession of it from Douglass, was the latter entitled to retain from the gross emoluments thereof for the time he unlawfully held the office against Wright, the amount paid out for clerk hire for discharging the duties thereof during the same period?

The appellant bases his claim to hold the office under the appointment of the board of commissioners, on the first section of the act of May 31st, 1852, in relation to county auditors (1 G. & H. 122), which provides, that "the county auditor shall hold his office for the term of four years from the first Monday in March next succeeding his election, and until his successor is elected and qualified."

We do not think that section is applicable to the case before us. Conceding that it was the intention of the legislature by the provision quoted to fix the time of the commencement, as well as the duration of the term of office, yet it seems evident that it was intended to apply only to a regular succession of terms by election.

The appellant was appointed auditor, upon the resignation of Miller, under section four of the act touching vacancies in office, and filling the same by appointment, approved May 13th, 1852 (1 G. & H. 671), which provides, that "the board of county commissioners shall fill all other vacancies in county and township offices, except," &c., "and such appointment shall expire when a successor is elected and qualified, who shall be elected at the next general or township election, as the case may be, proper to elect such officers."

It is evident that it was intended by this section that the officer elected should take the office as soon after his election as he should be qualified.

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These separate statutes were enacted by the same legislature, and within a few days of each other, and, if it may be fairly done, should be so construed as to be consistent with each other. The construction which we have given to them seems to us to be the only proper one, and it makes no conflict between them. But if we were mistaken in the true meaning of the first section of the act of May 31st, 1852, still we would be correct in the conclusion that Wright was entitled to the office at the time he demanded it of Douglass, November 11th, 1867, for the reason that the section referred to, so far as it fixed the commencement of the auditor's term on the first Monday of March next succeeding his election, was repealed, by implication, by an act approved March 3d, 1855 (Acts 1855, p. 52), fixing the commencement of the terms of certain county officers, &c., the first section of which is as follows: "That the terms of office of the following named county officers, to wit: The sheriff, treasurer, coroner, auditor, recorder, clerk, surveyor, and county commissioners, shall commence on the first Monday of the month of November, immediately following the general October elections, and that any of the above-named officers to be elected hereafter shall hold their offices until the first Monday of November aforesaid, according to their respective terms." But it is said, that this act is in conflict with sec. 2, art. 6, of the State Constitution, and is therefore void, and that it was so held in *Howard v. The State*, 10 Ind. 99. In that case, Stembell was elected treasurer of Benton county, in October, 1854, for the term of two years, commencing on the 15th of August, 1855, and terminating on the 15th of August, 1857. Vawter was elected to the same office at the October election, 1856. He was declared duly elected by the board of canvassers of said election, and his election properly certified to the clerk of the circuit court, on the Thursday succeeding the election. Vawter claimed the office from the 15th of August, 1857, the time of the expiration of Stembell's term, by virtue of:

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his election thereto at the October election next preceding. The clerk, however, refused to make out and transmit a statement of the votes cast for Vawter, to the Secretary of State. Vawter applied for a mandate to compel him to discharge that duty. The clerk placed his refusal on the ground that the act of 1855 extended Stembell's term until the 1st of November, 1857, and that his successor could not, therefore, be legally elected, until the October election of that year, as such election would precede the expiration of Stembell's term. On appeal to this court, it was held, that by section 2 of article 6 of the Constitution, the term of the treasurer is definitely fixed at two years, and that it was not in the power of the legislature either to diminish the term below, or extend it beyond, the period fixed by the Constitution; that, applied to the facts of that case, the act of 1855 affirmatively extended the term of office beyond the limit fixed by the Constitution, and was therefore held invalid.

The same objection, however, is liable to be urged to the act of 1852, in its application to given cases.

In the creation of the office of auditor, before the adoption of the present Constitution, the law fixed the term to commence on the first Monday in March, and made its duration five years. The elections were then held in August, and in many instances where vacancies occurred by resignations, death, or otherwise, the successors elected came into office soon after the election. The second section of the sixth article of the Constitution provides for the election of auditors at the time of holding general elections, to hold for the term of four years, and by the tenth section of the schedule, auditors in office at the date of the adoption of the Constitution were authorized to continue in office until the term for which they were respectively elected should expire, provided that no such person should continue in office, after the taking effect of the Constitution, for a longer period than the term of such office prescribed therein. Now, suppose the term of an auditor, that commenced in

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August, had less than four years to run after the adoption of the Constitution; the election being changed from August to October, a successor would have been properly elected in October next preceding the expiration of such term; and if the successor would have been entitled to the office on the first Monday of March next succeeding his election, under the first section of the act of May 31st, 1852, the previous term would be thereby seriously decreased. Both acts, so far as they fix the commencement of the term, involve the same principle, and are alike subject to the same objections, as applied to particular cases, but may be constitutional as applied to others; and hence, the act of 1855, being in direct conflict with that particular provision of the first section of the act of 1852, repeals it by implication.

The act of 1855, as applied to the case under consideration, would not be obnoxious to the Constitution, but as we have seen, the case is, in fact, governed by a different statute.

Having thus determined that Wright was entitled to the office at the time of the demand, on the 11th of November, 1867, it follows that the demurrer to the information was properly overruled.

Wright, being the auditor *de jure* from and after the 11th of November, 1867, was entitled to exercise the franchises of the office, and to receive the fees and emoluments thereof. The right of Douglass to hold the office ceased at the same time, and he was thereafter a mere intruder, and his subsequent exercise of the office was a usurpation.

The remaining question is as to the measure of Wright's damages. Is he entitled, as was held by the circuit court, to recover the whole emoluments of the office received by Douglass for the time he unlawfully held possession, without any deduction for necessary clerk hire paid out by Douglass for discharging the duties of the office during the same time?

This question was virtually decided adversely to the claims of the appellant in *Glascock v. Lyons*, 20 Ind. 1. There the parties named were both candidates for the office

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of sheriff of Fountain county, at the October election, 1856. Lyons was declared elected, was commissioned, and, having qualified, entered upon the duties of the office. Glascock contested the election, which was finally determined in his favor, and he recovered the office. He then sued Lyons for the whole amount of the fees of the office received by him during the time he kept Glascock out. The court below sustained a demurrer to the complaint, which, on appeal to this court, was held good. In the decision of the case it is said, in substance, that a person who is rightfully entitled to an office, although not in the actual possession of it, has a property in it, and may maintain an action for money had and received, against a mere intruder who may perform the duties of the office for a time and receive the fees arising therefrom, and such intruder cannot retain any part of the fees as a compensation for his labor. But it is argued by the appellant, that the decision was based on the allegation that Lyons had obtained the certificate of election and commission by deceit, falsehood, and fraud. We do not see how that allegation could effect the question of damages. If Glascock was entitled to the office, then Lyons was a usurper, and every one who usurps an office and thereby excludes the person rightfully entitled to it is guilty of a wrong which operates as a fraud, and the averments in that case amounted to no more.

It is said in 1 Selwyn N. P. 81, that "where a person has usurped an office belonging to another, and taken the known and accustomed fees of office, an action for money had and received will lie at the suit of the party really entitled to the office, against the intruder for the recovery of such fees." The same principle is clearly recognized in *Lighly v. Clouston*, 1 Taunt. 112, and in *Allen v. McKean*. 1 Sumner, 276.

And so, in *Boyter v. Dodsworth*, 6 Term R. 681, Lord KENYON said, "if there had been certain fees annexed to the discharge of certain duties belonging to this office, and the defendant had received them, an assize would have lain; and

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the action for money had and received to recover fees has always been considered as being substituted in the place of an assize."

The principle involved in the case at bar was directly passed upon in *Dorsey v. Smyth, County Auditor, &c.*, 28 Cal. 21. In that case, one Brown was the incumbent of the office of district attorney of the county of Toulumne. Platt and Dorsey were opposing candidates for the same office. Platt was declared elected, but Dorsey contested his election on the ground of illegal votes, and the contest was determined in Dorsey's favor, in December, 1863. Platt, however, appealed to the Supreme Court, where the judgment below was affirmed, at the October term, 1864. The term of office commenced on the first Monday in March, 1864. Dorsey qualified and demanded the possession of the office of Brown at the commencement of the term, but he refused to surrender it until after the final determination of the contest in the Supreme Court. Brown received the salary for the time he held over, amounting to seven hundred dollars. When Dorsey came into office he claimed the salary for the same time, and demanded of Smith, the auditor of the county, a warrant on the treasurer for the amount, which the auditor refused to issue. Dorsey then applied for a mandate to compel the issue of the warrant. It was held that he was entitled to it; that Brown was presumed to know the law, that he was a mere intruder for the time he held the office against Dorsey, and was not entitled to any compensation for his services.

In the case of the *United States, for the use of Crawford v. Addison*, 6 Wal. 291, Crawford, being the Mayor of the city of Georgetown, was, in 1859, a candidate for re-election. Addison was the opposing candidate. Crawford was returned as elected. He presented himself to the city council and offered to take the usual oath. The council, on a count of the votes made by themselves, declared that Addison was really elected, and he was accordingly sworn into office and entered upon its duties. On a *quo warranto*

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against Addison there was a judgment of ouster. He took a writ of error, and executed a bond in the sum of three thousand dollars, to prosecute the writ and to answer all damages and costs, if he should fail to make his writ good. The writ of error was subsequently dismissed, and Crawford came into office, and then brought suit on the bond to recover \$1,104, the amount of the salary received by Addison, from the date of the bond to the time that Crawford got possession of the office. It was held, that the amount of the salary received by Addison, during said period, constituted the measure of the damages which the plaintiff was entitled to recover on the bond. It is also said in the decision, that "the rule which measures the damages upon a breach of contract for wages or for freight, or for the lease of buildings, has no application. In these cases the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and the damages recovered will be the difference between the amount stipulated and the amount actually received or paid. But no such rule can be applied to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical."

We are not aware of any principle of the law that would entitle the appellant to claim a deduction from the amount of the fees received by him during the time he unlawfully held the office against Wright. The official acts of the appellant during that time are held to be valid as to the public and third parties, simply because the public good requires that it should be so, to prevent still greater mischiefs. But as to the appellant himself, they were illegal. Being a mere intruder, the appellant can claim no benefit from his acts; he was not entitled to receive any compensation for the services rendered, either by himself or by those acting under him, and could not maintain an action for the recovery of the fees appertaining to the office. *Bentley v. Phelps*, 27 Barb. 524; *Riddle v. The County of Bedford*, 7. Serg. & R. 386; *People v. Tieman*, 30 Barb. 193.

Wright was entitled to the office and to receive the fees and emoluments of it, but by usurpation the appellant unlawfully held the office and received the emoluments without the assent of Wright, either express or implied. The money so received was due to Wright, and the appellant must therefore be held as having received it to his use.

And, as the appellant was an intruder, and held the office and performed the labor against the protest and express will of Wright, the law cannot imply a promise to pay any compensation for such services; and hence he is not entitled to any deduction from the amount of fees received by him, on account of such services or clerk hire.

The judgment is affirmed, with costs.

GREGORY, J.—I disagree with my brother judges on the question of damages involved in this case. This is not an action “for money had and received,” but an information under the statute, against the appellant for usurping an office to which, it was claimed, the relator was commissioned, qualified, entitled, and of which he had demanded possession. The statute provides, that “whenever an information shall be filed against a person for usurping an office, by the prosecuting attorney, he shall also set forth therein the name of the person rightfully entitled to the office, with an averment of his right thereto; and when filed by any other person, he shall show his interest in the matter, and he may claim the damages he has sustained.” 2 G. & H. 323-4, sec. 752. How much damages has the relator sustained by the wrongful act of the defendant? is the question to be solved.

The damages, by the very words of the statute, are compensatory, and not punitive; “the damages he has sustained” is the criterion, and not, as in the statutory action of seduction, by the injured party, “such damages as may be assessed in her favor.” 2 G. & H. 55 sec. 24. If this is the correct view of the statute, it seems to me plain, that whatever sum of money would compensate the relator for

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his actual loss, is the measure of damages. There was no attempt in this case to reduce the damages by showing that the relator might have procured other like employment for the time he was kept out of office, or some portion thereof, and therefore that question does not arise.

Had the relator succeeded in getting the possession of the office, he would have been compelled to avail himself of the assistance of a clerk, for otherwise it could not be said that the sum named in the agreed statement of facts, was paid out for necessary clerk hire. The office of county auditor is mainly, if not wholly, ministerial, and if the entire duties cannot be performed by the incumbent, then he must provide the necessary aids to accomplish that end.

United States v. Addison, 6 Wal. 291, cited by the court, is decided on correct legal principles, and, when properly understood, does not conflict with my views in the case at bar. It is correctly said, in that case, that "the rule which measures the damages upon a breach of contract for wages or for freight, or for the lease of buildings, has no application. In these cases the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and the damages recovered will be the difference between the amount stipulated and the amount actually received or paid. But no such rule can be applied to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical." The legal reason why no such rule can be applied in such cases is to be found in the principles settled in *Costigan v. The Mohawk & Hudson R. R. Co.*, 2 Denio, 609, cited by the court. It is, that in actions on contracts of hire for services to be performed in a particular kind of employment or business, for a specified time and compensation, where the plaintiff has been unlawfully dismissed by the defendant, the latter may show in reduction of damages, that employment of the same general nature as that from which he has been dismissed, and to be carried on in the same locality, has been offered to the former and refused by him; but not a different kind of employment, or

business to be conducted at another place. In the *United States v. Addison*, *supra*, the relator, Crawford, had been elected to the office of Mayor of Georgetown for the term of two years and until a successor should be duly elected. Of course this office involved a trust and confidence, the duties of which were not purely ministerial or clerical, and, in the very nature of things, there was no other employment of the same kind, to be carried on in the same locality, to be found.

Glascock v. Lyons, 20 Ind. 1, cited in the opinion, does not hold, as I understand it, as stated by the judge who speaks for a majority of the court, that the "intruder cannot retain any part of the fees as a compensation for his labor." No such question was involved in the case. The simple question involved in that case was, whether the action "for money had and received" would lie by Glascock against Lyons, the latter having been commissioned and qualified, the former not having been commissioned. It had been urged that Glascock could not maintain the action "for money had and received" for the fees of the office, because he had never been in a situation to be entitled thereto, he never having been commissioned and qualified. This court attempt to answer that objection, and then say, "if the proposition is correct that he who is rightfully entitled to an office has a property in it, though not, perhaps, strictly in the commercial sense of that term, then we are not able to perceive how a mere intruder, who may perform the duties for a time, can, in good conscience, retain the fees, &c., for such service. If he could, under such circumstances, be permitted to retain such fees, it would be on the ground that they were a remuneration for his labor, &c.; but that would not justify the retention of any sum over such mere remuneration; if justified to that amount, how could the case be distinguished from one where A. B. may, without a contract or request, express or implied, perform ordinary labor for C. D.? In the latter, it is well settled there is no right of action accrues to the laborer. How

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could there in the former? If not, upon what principle can the labor be set up as a defense to an action for money received to which the plaintiff was entitled. We are now treating this case as resting upon the facts averred and by the demurrer admitted to be true, namely, that the plaintiff was duly elected and justly entitled to the office, but that the defendant had obtained the evidences of title thereto through deceit, falsehood and fraud—had intruded into the same and was usurping the duties thereof. Under these admitted facts, we are not able to perceive any good conscience there would be in permitting the defendant to retain anything over a bare compensation, nor, in view of the well established class of decisions in similar cases already adverted to, how he can retain any portion of said fees. If the facts are not as stated, issue should have been taken thereon."

I have made this long extract for two purposes; first, to show that the assumption of the majority is without foundation; and secondly, to answer the *dictum* of the judge as to that class of cases where labor is performed without contract or request. For it seems to me that the whole argument in the case at bar, drawn from the fact that the action for money had and received will lie in this class of cases, is founded on a false assumption. In the class of cases like the one at bar, the form of the action, if in assumpsit "for money had and received," confirms the authority of the wrong doer in the act of collecting the fees, and converts him into an authorized agent for this purpose. Douglass was a mere intruder; Wright was commissioned and qualified and demanded the office; in such a case, the latter could collect the fees of the office as they accrued; and, according to some of the cases, even a payment to the intruder would not protect the payer from paying them to the rightful officer. *The People v. Tieman*, 30 Barb. 193; *The People v. Smyth* 28 Cal. 21. Now, if Wright, instead of bringing this action, had brought an action for "money had and received" against Douglass, for the fees collected by the latter,

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it would have been a confirmation of his acts in the collection thereof.

In *Hunter v. Prinsep*, 10 East, 378, Lord ELLENBOROUGH, C. J., says, "the plaintiff, having sued for the proceeds in this form of action 'for money had and received,' has, in virtue of his so suing, adopted and confirmed the act of the master, by which the goods were converted into money." Paley recognizes the same principle. See Dunlap's Paley's Agency, 173, and note (*w*) and the authorities there cited. The confirmation of an authorized act relates back and covers the entire act from the beginning. So, in the case put, Douglass would have been the authorized agent from the beginning in the collection of the fees due Wright. Now, in such a case, the rule is, "whatever an agent is entitled to deduct from the demand of his principal for advances or disbursements of any kind, may be given in evidence in an action brought against him, without pleading it, or giving notice of set-off. For the balance only is the debt." Dunlap's Paley's Agency, 124.

But I cannot see what the fact that an action for "money had and received" will lie, can have to do with the measure of damages in this case. Nor does Douglass claim to retain one cent for his labor; he only claims to deduct the necessary expense in making and collecting the fees in question; and I know of no rule of law or of morals that would prevent him from having what he is so justly and equitably entitled to. The fact that he was a wrong doer does not deprive him of this right. All the relator can claim is to be placed in as good a condition as he would have been had he got possession of the office.

To my mind it is rather singular legal logic to say, that *The People v. Smyth*, *supra*, is in point in the case in judgment, when, according to that case, Wright could now sue and recover the entire fees of the office from the parties against whom they were taxed, and the fact that they had paid them to Douglass would be no defense; and yet, the fact that Douglass had collected them without au-

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thority would entitle Wright to damages against him for the full amount thereof. A. collects from B. one hundred dollars due C., without authority; C. could insist on payment from B., notwithstanding the unauthorized payment to A.; and yet an action for the wrongful act of A., in favor of C., according to this reasoning, must result in a judgment of one hundred dollars, although the act did not damage C. one cent. In such a case, it is true that C. could waive the wrong and sue A. for the money in an action for "money had and received," but in such a case A. would then become the authorized agent of C.

S. K. Wolfe, J. E. McDonald, A. L. Roache, and E. M. McDonald, for appellant.

W. Q. Gresham and T. C. Slaughter, for appellee.

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STATUTE.—Legislative Interpretation.—It is not ordinarily the function of the legislature to interpret statutes; nor is such interpretation binding upon the courts as to a past transaction, but as to matters occurring thereafter such legislation guides all the departments of the government.

JURISDICTION.—Associate Judges.—Guardian and Ward.—The Associate Judges, as a Court of Probate, had jurisdiction on the 10th of August, 1829, to appoint guardians for infants, and such court was a court of record. It had jurisdiction of guardians' petitions to sell lands. Such jurisdiction extended to lands situated anywhere within the State. Though the law required a bond to be given before entering the order of sale, the failure to require one would not render the proceeding void.

SAME.—Probate Court.—The Probate Court, upon its organization under the act of 1829, had authority to take jurisdiction of matters in relation to guardians and wards then pending in such Court of Probate held by the Associate Judges, and conduct them to conclusion.

SAME.—Collateral Proceeding.—Where a proceeding in a court of superior jurisdiction is of such a character that upon final action the court should, from the nature of the case, ascertain whether it is such in fact that it has

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jurisdiction to act as it is invoked to do, and it does so act, the matter cannot be questioned collaterally.

SAME.—Residence of Ward.—The Associate Judges, as a Court of Probate, on the 10th of August, 1829, appointed a guardian for certain infants.

Held, that an inquiry as to whether the infants were at the time of such appointment residents of this or another state, could not be raised collaterally.

SAME.—Vendor and Purchaser.—Guardian's Sale.—Application of Proceeds.—

Where a guardian, who has received his appointment from a court of superior jurisdiction having authority to make such appointments and jurisdiction of guardians' petitions to sell lands, but without jurisdiction to make the particular appointment, sells land of his ward, under an order of such court, to one who purchases and pays for such land, relying in good faith on such order, such purchaser will be protected in the title so acquired, if the guardian applies the proceeds properly. And in an action by the late ward, arrived at majority, to recover such land, a debt of the guardian against the deceased father of the ward, through whom the plaintiff claims title, allowed by such court as a credit to the guardian upon settlement, will be presumed to have been rightfully allowed.

INDIAN TREATY.—Grant.—Relation.—A section of land, to be located under the direction of the President, was granted to a certain person by an Indian treaty; and after the death of the grantee, the proper court, upon petition of the guardian of the grantee's heirs at law, ordered the sale of the unlocated section; and, the land having been located by the assignee of the purchaser at such guardian's sale, the proper court ordered a conveyance of the specific land to such assignee, which was made, but never approved by the President.

Held, that, by the doctrine of relation, the treaty operated instantly in law as a grant, the subsequent location of the land merely ascertaining the specific thing which was granted.

Held, also, that the approval of the President was not necessary to the validity of the guardian's deed of conveyance.

SAME.—Case Stated.—Suit by the heirs at law of A. against B., to recover certain real estate. Trial upon the following agreed statement of facts: A section of land was granted by treaty with the Potawatamies, of October 16th, 1826, to A., to be located under the direction of the President. It was located, in 1837, in Allen county, without the territory ceded by the Indians under said treaty, the premises in controversy being a part of that section. In 1828, A. died, in Illinois, where he then resided, leaving a widow and children surviving him, who continued to reside in Illinois until 1831, when they removed to Knox county, in this State, prior to which they had no property in Indiana, except the unlocated land. It appeared by the record of certain proceedings in Knox county, that on the 10th of August, 1829, the court doing probate business, held by the Associate Judges, appointed a guardian of A.'s children, the plaintiffs in this action, and that "there being no property," no bond was required. The bond required by law was to be in double the value of the personal property. On the follow-

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ing day, the guardian presented his petition to sell the unlocated section, and, after an appraisalment at \$800, the sale was ordered, the guardian to give bond with sureties approved, within thirty days, but no such bond appeared in the transcript of the proceedings. The sale was to be private, for one-half cash and the balance in two equal annual instalments. In August, 1839, the guardian reported to the Probate Court, that in November, 1831, he had sold the float for \$1,000 to one who transferred his right to another, and he to C., who paid the purchase-money and, after having procured the land to be located, died, the report describing the section located. The Probate Court confirmed the sale and directed a conveyance of the specific land to the heirs at law of C. which was accordingly delivered, but was never approved by the President. The title of C. and his heirs afterwards became vested in B., who, with his grantors, paid taxes on the land and took care of and protected it from 1841, though not in actual possession, till the commencement of this action, in 1865. From its location, in 1837, till 1841, it was worth \$30 per acre. From January, 1829, till 1840, the United States, it was admitted, held public lands in Knox county and elsewhere, in this State and other states. Upon this evidence the court found for the defendant.

Held, that the evidence sustained the finding.

APPEAL from the Allen Circuit Court.

FRAZER, C. J.—This was an action by the appellants, heirs at law of Francois Dequindre, against the appellee, to recover land in Allen county. An issue was made by the general denial, which was submitted for trial upon an agreement as to the facts. There was a finding for the defendant and judgment thereon over a motion for a new trial.

A section of land was granted, by treaty with the Potawatamies, of October 16th, 1826 (7 U. S. Stat. at Large, 295), to Francois Dequindre, to be located under the direction of the President. It was located in 1837, in Allen county, without the territory ceded by the Indians under the treaty; and the premises in controversy are a part of that section. Dequindre died in Illinois, where he then resided, in 1828, leaving a widow and children surviving him, who continued to reside in Illinois until 1831, when they removed to Knox county, in this State, prior to which they had no property in Indiana, except the unlocated land.

It appears by the record of certain proceedings in Knox county, that, on the 10th day of August, 1829, one Broni-

lette was, by a court doing probate business, held by the Associate Judges, appointed guardian of Dequindre's children, who are the present plaintiffs; and it is recited, that "there being no property, no bond is required." The bond required by law was to be in double the value of the personal property, which being nothing, the want of such bond cannot vitiate the appointment. On the following day, the guardian presented his petition, praying authority to sell the unlocated section, which (after an appraisement at eight hundred dollars) was ordered, the guardian to give bond, with sureties approved, within thirty days. No such bond appeared in the transcript of the proceedings. The sale was directed to be at private sale, for one-half cash in hand, the balance in two equal annual instalments.

In August, 1839, the guardian reported to the Probate Court, that, in November, 1831, he had sold the float to John and William Hamilton, for one thousand dollars, whose right they had transferred to another, and he to one McBean, who paid the purchase-money and died; that McBean had procured the land to be located, describing the section located. That court confirmed the sale, and directed a conveyance of the specific land to the heirs at law of McBean, which was accordingly delivered, but was never approved by the President. The title of McBean and his heirs afterwards became vested in the defendant, who, and his grantors, have paid taxes on the land, and taken care of and protected it, since 1841, though never in the actual possession thereof. (This suit was begun in 1865.) From its location, in 1837, until 1841, this land was worth thirty dollars per acre. The United States, it was admitted, held public lands in Knox county and elsewhere, in this State and other states, from January, 1829, until 1840.

We are to determine whether this evidence was sufficient to sustain a verdict for the defendant.

The claim of the plaintiffs was stale, and it is not questioned that the defendant was an honest purchaser, for an

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adequate price. These circumstances do not, in this particular case, possess much influence; for the decision must turn, not on questions of fact, but of law. They do, however, seem to class the case amongst those not deemed favorites of the law. Nevertheless, if the title of the plaintiffs has not been divested by the proceedings of the courts of Knox county, already stated, nor their suit barred by any statute of repose, they must recover.

A number of questions have been agitated in the arguments, written and oral, which we have found it not easy to determine to our own satisfaction; and though we have been aided greatly by the industry and learning of able counsel, upon some of them we have not, after the fullest consideration, found ourselves agreeing with entire unanimity.

1. Had the Associate Judges jurisdiction on the 10th of August, 1829, to appoint guardians for infants?

Much of the legislation at that early period of our history as a State was exceedingly obscure and difficult of construction. By the act of 1824 (R. S. 1824, p. 314), the equity side of the circuit court had complete original jurisdiction of the relation of guardian and ward and of all matters relating to the settlement of decedent's estates. By the act of 1825 (Acts 1825, p. 55), the act of 1824 was so amended that the associate judges should be a "court of probate," with "power to hear and determine all matters in relation to the settlement of decedents' estates," which, by the act of 1824, had been vested in the circuit courts, with power to the circuit courts to correct and review their proceedings. It will be seen also, that, by the second section of this act, it was intended to give them jurisdiction to direct the sale of the real estate of decedents to pay debts. To do this business, sessions were to begin on the Mondays preceding the regular terms of the circuit courts.

No express provision was made as to whether any records of this court of probate should be kept, nor that it should have a seal or clerk. Yet those portions of the act

of 1824 were left in force which authorized the clerk of the circuit court, in vacation, to take the proof of wills and to grant letters testamentary and of administration (sec. 4), requiring inventories and accounts of sales to be filed in his office (secs. 8, 9); and the practice was universal, so far as we have been able to learn, that the clerk of the circuit court acted as clerk of this probate tribunal and kept its records, as such records had been kept when the equity side of the circuit court exercised the jurisdiction; and it is believed that its process was, in fact, attested by the clerk and seal of the circuit court.

If the question depended wholly upon a construction now to be given to this act of 1825, it would be not only difficult, but, perhaps, impossible, to hold that it conferred authority to appoint guardians. There is nothing in the terms of the act to justify it, and no obscurity in the language employed to call for construction.

The authority given, and the only authority, was, to "hear and determine all matters in relation to the settlement of decedents' estates." But the associate judges did, nevertheless, in some counties, and, it is believed, very generally, assume jurisdiction to appoint guardians for infants, and over the relation of guardian and ward, even to the extent of directing the sale of real estate of wards by their guardians. *Hiestand v. Kuns*, 8 Blackf. 347, and *Hunt v. White*, 1 Ind. 105, are cases in which such appointments were made, and the validity of them seems to have passed unquestioned. Subsequent legislation repeatedly recognized this jurisdiction as rightfully exercised.

In 1826, it was enacted, "that in the appointment of guardians, &c., it shall not be lawful for the circuit court or court of probate to appoint as guardian, * * the executor or administrator of the estate in which such minor is interested." Acts 1826, p. 55, sec. 23. In March, 1826, the court house of Dearborn county was destroyed by fire, together with the records of the county. In 1827, an act was passed

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for the relief of persons likely to suffer by the loss of the records. Acts 1827, p. 53. The sixth section relates to procuring evidence of probate business done, record of which had been destroyed. The eighth section relates, amongst other things, to guardians' bonds destroyed, and provides, that if new bonds be not given within three months, such guardians shall be deemed to have resigned, and that the court of probate shall appoint others, as in cases of resignation or refusal to act.

In 1828, it was provided, that the twenty-third section of the act of 1826, *supra*, should not apply to testamentary guardians, and that such testamentary appointments of guardians should be confirmed by the circuit court or court of probate. Acts 1828, p. 70. The sixth section of this act repealed so much of the act of 1824 as gave original jurisdiction of "probate business" to the circuit courts, except where the title to real estate might be brought in question. On the 19th of December, 1828, an act was passed, appointing a guardian and providing that he should give bond to the satisfaction of the circuit court or court of probate. Acts 1829, p. 57. On the 26th of the same month, it was provided, that where an associate judge was executor or administrator, he should make settlement with the circuit court of his county, a record whereof should be made by that court in the record book of the probate court. *Id.* 56.

It thus appears, most conclusively, that the Associate Judges, sitting as a Court of Probate, under the act of 1825, did exercise jurisdiction to appoint guardians for infants; that the legislature subsequently acted with a knowledge of this fact and, by the strongest implications, recognized it as a lawful authority, and that they deemed it a court of record, and that the clerk of the circuit court was its clerk.

It is not ordinarily the function of the legislature to interpret statutes, nor is such interpretation binding upon the courts as to past transactions. But as to matters oc-

curing thereafter, such legislation guides all departments of the government. Sedgw. on Const. 253. If a legislative construction be even plainly contrary to the terms of the act construed, it must, nevertheless, be taken as a new enactment, changing the old law.

In January, 1829, a new court was created, called the Probate Court, with a single judge, vested with full original jurisdiction over all matters concerning the settlement of decedents' estates, the appointment of guardians, &c. Acts 1829, p. 33. The judge thereof was to be elected at the August election following. This act repealed all others coming within its purview—but it was not to take effect until the first day of August; and it was provided that all "probate business shall continue to be done as it now is," until the judge of the new court should be qualified and ready to act; and all business in the circuit courts, "in any way relating to the settlement of decedents' estates or last wills and testaments" should, it was provided, progress to a final conclusion in the circuit courts. Was this intended to make no provision, during the period between the first of August and the full organization of the new Probate Court (it would be weeks and it might be months), for the transaction of matters relating to decedents' estates, pending in the old Court of Probate, nor for the appointment of administrators and guardians and the transaction of their business?

The attention of the legislature was, it is evident, fixed upon the necessity of making some provision for the transaction of the business to be done by the new court, after the first of August, until the new tribunal should be organized. It accordingly provides for certain pending business then in the circuit courts; and as to all else, it makes only provision for so much as may be comprehended by the phrase "all probate business," a phrase literally signifying, in this connection, perhaps only matters concerning the probate of wills. But we think the words in this instance, as well as

in the act of 1828, where the same words were used, must be deemed to have been used in a wider sense.

Common usage, local perhaps to this State, had adopted the phrase as signifying such business as the court of probate was authorized to transact, and that use of the words has indeed continued until this day—even amongst members of the bar—comprehending all matters concerning the relation of guardian and ward.

In the first section of the act of 1825, already referred to, the same phrase is used in such a connection as clearly to import a meaning much broader than the literal signification of the words.

Inasmuch as the associate judges had done this business, and were then doing it, under legislative approval, it seems plain that it was intended that they should continue in the same manner, until the new court should be provided with officers ready to enter upon duty. The words of the act providing that this business "shall continue to be done as it now is," seem clearly to relate, not only to the officers who shall act, but also to the manner in which they shall proceed and the tribunal in which proceedings shall be conducted. They constitute a proviso or exception to the general words of the repealing clause of the act, and continue previous laws in force, for the time being, and until all the machinery for executing the new law can be provided, to the end that there shall be, during the period subsequent to the first of August and until the judge of the new court shall be commissioned and qualified, a court having jurisdiction to transact this important and necessary business. It would be an unnatural construction of this language to say that it was merely intended that the associate judges should occupy the bench of the new court until its proper judge was qualified to act. That would not be doing the business as the same was previously done, but in a new and, in many respects, a different manner. Besides, such was not, so far as we have been able to inform ourselves, the contemporary understanding of the act. In the case in hand.

which is one instance, the judges purported to hold, not the new Probate Court, but the old Court of Probate. They met in August, as the old court was required to meet, and not in September, the time fixed for the session of the new one. It was so in other counties, and we presume it was so generally. But perhaps the most conclusive evidence of what was understood at the time to be the meaning of this provision is found in an act of the very next session (Acts 1830, p. 47), amending this act, the fifth section of which makes it the duty of the associate judges to hold the new court in such counties as had not elected a probate judge, until one should be elected and qualified. If the same thing had been effected by the act of 1829, this would have been wholly useless. So that contemporaneous exposition, a circumstance of considerable weight after the lapse of forty years, was in harmony with what we deem the natural meaning of the words of the act.

It cannot be doubted that when the legislature enacted that "probate business shall continue to be done as it now is," it had full knowledge of the extent of the jurisdiction which the courts of probate in various counties had, in fact, assumed and were then exercising, to appoint guardians and act upon their applications to sell lands of wards. The language employed would, then, clearly authorize the exercise of this jurisdiction after the first of August, without reference to the question whether its exercise before had been lawful or not.

The foregoing considerations have conducted us to the conclusion that on the 10th of August, 1829, the associate judges, as a court of probate, had jurisdiction to appoint guardians for infants.

2d. The same reasoning leads to the conclusion that it was a court of record.

3d. And that it had jurisdiction of guardians' petitions to sell lands.

4th. But it is urged with great force, that inasmuch as

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these plaintiffs were residents of Illinois, no court in Indiana had jurisdiction to appoint a guardian for them.

This proposition is ably combatted by the other side, and it is claimed that the record of the appointment estops inquiry now as to the fact of residence. Numerous cases are cited upon each side of the question. It is the misfortune of American law that the cases are not in entire harmony upon the subject.

Much that has been said by the courts of various states, touching the matter, has had no close relation to the cause in which it was said; and very much of the apparent confusion and conflict of the cases is only apparent. If, in examining the decisions of different states as to the effect of records of courts, we shall ascertain whether the courts whose judgments were under discussion were superior or inferior courts, and if we shall then bear in mind that the law supports the judgments of the former by certain conclusive presumptions, against which neither argument nor proof shall be admitted, and which are not indulged as to the judgments of the latter, much of actual decision that appears to be in conflict will be found readily reconcilable. This, however, can not be said of the great volume of mere *dicta* which pervade the reports.

It has been long settled in this State, that our Probate Court, organized under the act of 1829, was a court of superior jurisdiction. In that particular the prior Court of Probate can not be distinguished from it. Both obviously belonged to the same class.

It cannot be said that the power to appoint guardians is a special power created by statute, and therefore required to be executed strictly according to law that it may be valid. At common law this power existed, belonging to the King, as *parens patriæ*, exercised, however, by the court of chancery, by authority of the sovereign. In this country, it would belong to the legislature, or, if deemed a judicial power, where by any of our state constitutions a division of powers is made and a judicial department created, it would

belong to the courts, to be exercised as in chancery, even in the absence of legislation expressly authorizing it. But, like any other judicial power, it might be regulated by statute. If, then, the legislature chose to require that this authority should be exercised by a court of superior jurisdiction, the validity of the record of such court in a given case of the kind must be tested by the rules ordinarily applicable to its records. This is settled in this State, as to proceedings by administrators for the sale of lands to make assets, thus applying the rule in a case unknown to the common law. And yet it is practically a wise rule and necessary to the repose of titles honestly acquired. Without it, such sales would be made with greater difficulty, and at prices seriously affected by the multiplied dangers of future litigation. It may work injustice in occasional instances, but it is hardly to be doubted that this is more than compensated by its benefits to the whole community.

Now, it is not to be denied that a court of superior jurisdiction may so make a record in a case where, in fact, it has no jurisdiction, that the validity of its judgment cannot be questioned collaterally. But in cases of collateral attack the legal presumption is that this will never be done.

In the matter in hand, the power of the court must have been invoked in some way. It was, and still is, usual in such cases to make an oral application for the appointment of a guardian. It then became the duty of the court to ascertain whether the case was one proper to call for the exercise of its power to appoint. For this purpose, it might hear proof as to residence, as well as concerning the circumstances of the infants. It should have determined these things before making the appointment.

The question of residence is sometimes one of great difficulty, upon the evidence. Suppose such investigation to have been fully made, and an erroneous decision reached, and letters of guardianship thereupon issued. Would it be a salutary rule that every one with whom the guardian might subsequently deal in the performance of his trust might go in-

to the question of residence again, to contest the validity of the appointment?

Must such a question remain forever open? If the highest court in America may be relied on, "the power to hear and determine a cause is jurisdiction." *United States v. Arredondo*, 6 Pet. 709. "Any movement by a court is necessarily the exercise of jurisdiction." *The State of Rhode Island v. The State of Massachusetts*, 12 Pet. 718.

Here the inquiry as to the residence of the infants was the exercise of jurisdiction. If that question was not correctly decided, it was an erroneous judgment, not a decision which the court had no power to make. The lack of power to determine should not be confounded with error in deciding a question of fact. And yet we are aware that there are numerous instances in which courts of high character, pressed by hard cases, appealing strongly to their sense of justice, have overlooked this distinction, and some in which it has been virtually denied.

We are strongly inclined to the opinion that it is a sound rule, applicable to courts of superior jurisdiction, that when the proceeding is of such a character that, before final action, the court should, from the nature of the case, ascertain whether it is such in fact that it has jurisdiction to act as it is invoked to do, and it does so act, the matter cannot be questioned collaterally. There are numerous cases to this effect. *Shroyer v. Richmond*, 16 O. St. 455, is exactly in point. *Cox v. Thomas' Adm'r.* 9 Grat. 323; *Grignon's Lessee v. Astor*, 2 How. (U. S.) 319; *Prigg v. Adams*, 2 Salk. 674; *Doe v. Smith*, 1 Ind. 451; *Doe v. Litherbery*, 4 McLean, 442. Citations might be greatly extended.

But there is another principle, old as Plowden, and never, we believe, questioned, though perhaps sometimes overlooked, which, it seems to us, is applicable here. The present case shows, in addition to what has been stated, that the purchase-money of the land was applied to the benefit of the plaintiffs, and some of it paid to them after they arrived at full age. The guardian accounted for the

whole, to the satisfaction of the Probate Court. Suspicion is directed only to a single item—a debt of the guardian against the father of the plaintiffs, and through whom they claim title.

It will not do to conclude that this was not an honest demand merely because the guardian was the claimant. The Probate Court allowed this as a credit, and it must be supposed rightfully. If it was a lawful claim, it could have been charged upon the fund or upon the land by administration, and it was therefore to the advantage of the plaintiffs that it be paid without the costs of regular and expensive proceedings to enforce it.

Graysbrook v. Fox, Plow. 275, was detinue by an executor for personal property, possessed by the testator at his death. Plea, that administration of the goods of the deceased had been committed to one Kene, by virtue whereof Kene sold the property to the defendant for a certain sum in hand paid. The ordinary, it was held, had no power to grant administration, because there was a will appointing an executor. It was held, also, that the plea was bad, but that it would have been good if it had averred that the administrator had employed the money in discharge of the funeral, or of the debts of the deceased, or about other things which an executor should be forced to do. In that case, the sale should not be avoided. It was said, "he that has the right suffers no disadvantage, for it is no more than he was compellable to do, and the act of the administrator shall be allowed good."

In *Coulter's Case*, 5 Co. 30, decided thirty-three years later, substantially the same principle was declared.

It seems, also, from the case in Plowden, that the same point was ruled as early as 4 H. VII., in *Sands v. Peckham*.

Fisher v. Bassett, 9 Leigh, 119, goes still further. An administrator had been appointed by the hustings court in Richmond, when, in truth, that court had no jurisdiction to appoint in the particular case, that belonging in another county, Middlesex. It was held, however, that he was ad-

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ministrator *de facto*, and that any payment to him by a debtor of the estate would be good against a subsequent administrator, appointed by the court of the proper county; and that as to the debtor, the appointment was voidable only. This ruling was afterwards approved by the same court in *Cox v. Thomas' Adm'r*, 9 Grat. 323. See, also, 1 Williams Ex. 520.

The rule deducible from these cases is, that one who deals in good faith with an administrator that has received his appointment from a tribunal having authority to make such appointments, but without jurisdiction to make the particular appointment, will be protected in payments made or in his title to property thus acquired, if such administrator applies the proceeds properly. The Virginia case goes further. The justice and good sense of this rule commends it to universal approval. It is strongly supported, too, by analogy, as will appear by an examination of the cases cited from Coke and Plowden. It is but adhering to one of the ancient and established landmarks of the law to be guided by it. It must be applicable to the present case. It can make no difference that this is a case of guardianship while those were cases of administration. The reasons for its application are exactly the same in either case. Here we have a purchaser of real estate acting upon the faith of an authority committed by a court of superior jurisdiction, whose money paid for the land has been applied as a guardian properly appointed might lawfully have applied it. The plaintiffs have received the benefit of his money. Why should he not be as fully protected as if the case had been one of administration?

5. The next inquiry seems to be whether the court in Knox county had jurisdiction of the particular application. An argument for the appellant is, that the court of Knox county had no jurisdiction to authorize the sale of lands outside of that county; that the treaty granted the land *in presenti*; that the location merely ascertained the particular tract previously granted; that, by relation, Dequindre took

title to the section in Allen county from the date of the ratification of the treaty. For the appellee, it is contended that the jurisdiction of the Court of Probate, as to the sale of infants' lands by guardians, was not local, but extended to lands situated anywhere within the State.

The State is divided into counties, and courts are organized and required to hold sessions in each county; but it does not necessarily result therefrom that the jurisdiction of such courts shall be confined either to persons resident, or things situate, within the county. Our courts are creatures of positive law, and have such jurisdiction, both as to persons and things, as is conferred upon them by statute or by the Constitution of the State. The Court of Probate had such jurisdiction as the statute gave it, no more and no less. It did not inhere in the nature of the tribunal that its jurisdiction in the sale of infants' lands should be confined to such lands as were within the county. The extent of its jurisdiction, then, must depend upon the construction of the statutes which conferred its powers upon it. The difficulty of the question is, however, enhanced by the consideration that, as we have seen, the jurisdiction of that court to direct the sale of the lands of infants by their guardians is maintained only upon the ground that it was assumed in the first place and afterwards directly and indirectly sanctioned by the legislature, before its exercise in the instance under consideration. If we could turn to a statute expressly conferring it, our simple duty would be to construe that statute and thereby solve the inquiry.

By the act of 1824 (R. S. 1824, p. 314, sec. 1), jurisdiction was conferred upon the equity side of the circuit courts over matters concerning "the trusts, rights and interests arising from the relations of guardian and ward, * * in as full and ample a manner as is allowed said courts in other cases belonging peculiarly to their cognizance." The thirty-second section expressly authorized the court to "appoint guardians of minors, * * on application made or advice given." The next section required inventories of the

personal estate of wards, as was required in cases of administration, and gave the guardian power to sell such property. Then section thirty-four reads, "The circuit court, upon the application of any guardian, who may be appointed under the provisions of this act, praying for the sale of any real estate of his ward, * * shall decree the sale of such real estate, * * and after the confirmation of any sale by the court, as in case of sales made by executors or administrators, the conveyance shall be made." Executors and administrators, upon discovering the insufficiency of the personal estate to pay the debts of the deceased, were required to make an inventory of the real estate and have it appraised, and file the inventory in the circuit court (meaning, certainly, the court which appointed the executor or administrator), and then, upon suggestion, and summoning the heirs, the court (the same court, surely) would decree the sale of the whole, or so much as might be necessary; but the court was to approve the sale before a conveyance should be made (sec. 10).

The thirty-fifth section required an inventory and appraisement of the ward's real estate to be filed before a sale thereof should be decreed, and a bond with sureties conditioned that the guardian should faithfully apply the proceeds of sale under the direction of the court. The thirty-eighth section required executors, administrators, and guardians to deposit, from time to time, in the court from which their authority was derived, "all inventories, with the valuations, memoranda of sales, and other papers containing important transactions in the management of their trusts."

This evidently referred to inventories and sales of real estate, as well as of personal property.

It seems, in view of all these provisions taken together, that the circuit court which appointed the executor, administrator, or guardian, was the one to which application must be made for the sale of the real estate. Otherwise, these various requirements could not be performed. Now, the

jurisdiction over sales of real estate by guardians, which the Court of Probate, created the next year, undertook to exercise, was the precise jurisdiction which before, by the act of 1824, belonged to the circuit court. And this was the jurisdiction which the legislature, as has been shown, afterwards recognized as lawful and proper, and, by the act of 1829, authorized to be continued over "probate business" until the new Probate Court, then created, should be ready for business; and it was under that authority that the Court of Probate acted in decreeing this sale. By an examination of the session laws of the State prior to 1824, it will be seen that no settled policy had been adopted as to the territorial jurisdiction of courts over such sales, either by administrators or guardians. It is a mere question of policy and convenience, which at that day had not been very well defined. It is believed that prior to 1824 authority had not been conferred on any court, by statute, to direct the sale of the real estate of wards generally; it was confined to houses and lots in towns and villages; and the court of any county had jurisdiction to direct such sales of lots wherever situated in the State. Acts 1818, p. 148, sec. 34. And yet, by the same act (sec. 24), lands of decedents could only be sold by direction of the court of the county where the land was situated. By the act of 1825 (Acts, p. 56), if letters testamentary or of administration were taken in a county in which were lands of the decedent, the court granting the letters could order the sale of those lands or any other lands of the decedent within the State. By the act of 1827 (Acts 1827 p. 49), the court granting such letters could direct the sale of a land office certificate for lands in any other county; though by the act of 1818 (Acts 1818, p. 144), only the court of the county where the land was situate could do it. By the revised statutes of 1831 and 1838, only the court appointing an executor or administrator could direct the sale; though as to the sales by guardians, the matter was not made definite.

But we need not further multiply references to statutes.

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It appears from those already made, that there was no settled policy which might afford aid in construing a statute silent as to the particular county in which the court should take the jurisdiction. It was only at a day comparatively recent that an action denominated, at common law, transitory, could not be brought in any county where the defendant might be found and served with process. *Wynn v. Kiser*, 7 Blackf. 299.

Where jurisdiction to order the sale of lands is given without limit express or implied as to territory, it is difficult to find a satisfactory reason for holding that its exercise shall be confined to lands within the county. Counties are created for the convenience of municipal government, and courts are organized within them that justice may be readily at hand. Where process is required and cannot go to the sheriff of another county, as is sometimes the case, the jurisdiction is limited, in consequence. But here no process was necessary. Upon the whole, the majority of the court (our brother ELLIOTT dissenting upon this point) are of opinion that the court in *Knox* had jurisdiction to direct the sale of the land in *Allen*. And we all agree that the doctrine of relation applies—that this treaty operated instantly, in law, as a grant, the subsequent location of the land merely ascertaining the specific thing which was granted.

6. The next question in order is, whether the Probate Court, upon its organization, had authority to take jurisdiction of matters then pending in the Court of Probate, and conduct them to a conclusion. We are of opinion that this question must be answered in the affirmative. There was no express enactment to that effect, but we think that the act of 1829 and the act of 1830, already referred to, imply that such was the legislative intention.

7. Though a bond was required by law to be given before entering the order of sale, yet the failure to require it was not an error rendering the proceeding void.

8. The approval of the President was not necessary to the validity of the guardian's deed of conveyance. The

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treaty did not require it in such a case. That clause was intended as a protection against imposition practiced upon the grantee and his heirs. It is commonly found in Indian treaties of that day, but has never been held applicable to conveyances made under the direction of courts.

Judgment affirmed, with costs.

L. M. Ninde, R. S. Taylor, W. H. Coombs, and W. H. H. Miller, for appellants.

J. L. Worden, J. Morris, W. H. Withers, D. D. Pratt, and R. Brackenridge, for appellee.

THE BOARD OF COMMISSIONERS OF MORGAN COUNTY v. JOHNSON.

COUNTY CLERK.—*Fees where Nolle Prosequi is Entered*.—A county is not liable to its clerk for fees taxed by him for services rendered in a criminal prosecution disposed of by a *nolle prosequi* being entered.

APPEAL from the Morgan Circuit Court.

The facts of the case, so far as it is necessary to state them to a proper understanding of the questions involved, are these:—

Johnson filed an itemized claim against Morgan county, before the board of county commissioners, amounting to \$936.92, for fees claimed to be due to him as clerk of the Morgan circuit court, in criminal prosecutions in which the defendants were acquitted on trial, or the indictments and informations were disposed of by *nolle prosequi*. The commissioners refused to allow the claim, or any part of it, and Johnson appealed to the circuit court.

In the latter court a motion to dismiss for want of jurisdiction was overruled.

A demurrer to the claim was then filed, which was also overruled.

A general denial was filed, and the cause was submitted

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160	6.32

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to the court for trial. The court found as follows: "That there is due the plaintiff from the defendant for fees and services rendered by the plaintiff since the first of April, 1865, in State cases in which there was an acquittal, the sum of three hundred and forty dollars; for fees and services rendered by the plaintiff since the first of April 1865, in State cases which were disposed of by *nolle prosequi*, the sum of \$718.75; and from these facts the court finds for the plaintiff and assesses his damages at the sum of one thousand and fifty-eight dollars and seventy-five cents."

A motion for judgment in favor of the appellant on the finding of the court was overruled. A motion for a new trial was interposed by the appellant, and overruled, and judgment was rendered on the finding. To all of which rulings proper exceptions were taken by the appellant.

ELLIOTT, J.—The appellee having entered a *remittitur* for three hundred and forty dollars, the amount found for costs in cases of acquittal, since the case was appealed to this court, the only question for our consideration is, is the county liable to the clerk for fees taxed by him for services rendered in a criminal prosecution in which a *nolle prosequi* is entered and the case thereby disposed of?

As there seems to be some confusion in some of the previous adjudications on this subject, a review of the legislative enactments may serve to present the question in a proper light. Reference is made in argument to the twenty-fifth section of the act of 1852, providing for the organization of county boards, &c., (1 Rev. Stat. 229) authorizing the board of commissioners to allow the clerk a compensation for extra services; but as it has been held, and we think correctly, that that section was repealed by the act of 1855, "regulating the fees of officers and repealing former acts in relation thereto" (1 G. & H. 328), we need not discuss its provisions. *The Board of Com'rs of Vermillion Co. v. Potts*, 10 Ind. 286; *Fifield v. The Board of Com'rs of Porter Co.*, 29 Ind. 593.

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The fifth section of the act of 1855, regulating the fees of officers, &c., (1 G. & H. 331) contains this provision: "Clerks and sheriffs shall be entitled to receive such reasonable allowance for extra services as the board of county commissioners may think right and proper, to be paid out of the county treasury." And the twenty-fifth section of the same act provides that, "in all criminal prosecutions, where the person accused shall be acquitted, no costs [shall be taxed] against such person, nor against the State or county, for any services rendered in such prosecution by any clerk, sheriff, coroner, justice of the peace, constable, or witness, but in all cases of conviction such fees and costs shall be taxed and collected as in other cases, from the person convicted."

Construing these sections together, as we must, it is evident that the words "extra services," as used in the fifth section of the act of 1855, was not intended to include the fees for services rendered in criminal prosecutions in which the accused might be acquitted. It is claimed that it was ruled otherwise in *The Board of Com'rs v. Potts, supra*. That was a claim presented by Potts, as sheriff. The nature of the items composing the claim does not appear, and the only questions decided were, that the act of 1855 repealed the provision in the act of 1852 limiting such allowances to one hundred dollars; and that an appeal would lie from the decision of the board of commissioners in such cases.

The twenty-fifth section of the act of 1855 is not alluded to in that case, and as it expressly prohibits the taxation of such fees to the county in cases of acquittal, we must suppose that the claim in that case was not made for such services, or, if so, that section twenty-five was overlooked.

An act was passed in 1861 (Acts 1861, p. 37), the first section of which provides, "that the board of county commissioners shall annually allow the clerk and sheriff of their respective counties an annual compensation for extra services as such, not exceeding one hundred dollars each; but no such allowance shall be made to either of those of-

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ficers until he shall have filed a detailed statement of his charges, with items and dates, and taken and subscribed an oath or affirmation to the truth thereof. The board may then make such reasonable allowance as they deem proper, but in no event to exceed the sum above named; which allowance shall be in full of all compensation for extra and other services where no certain fee is fixed by law."

The fifth section of the act of 1855 relates exclusively to sheriff's fees, except the clause in relation to allowances for extra services, which, as we have seen, includes clerks.

In 1865 an act was passed amending the fifth section of the act of 1855. The only change made by the amendatory act is in reference to the compensation allowed for certain specific services of sheriffs and the addition of a single item. The clause in relation to extra services is re-enacted as it stood in the act of 1855, without any change whatever. The act of 1865 contains no repealing clause, and only repeals the act of 1861 so far as they are in conflict, by implication.

The only conflict which need be noticed here is that in relation to the amount that may be allowed for extra services, which by the act of 1861 is limited to one hundred dollars, whilst by the act of 1865 it is required to be such reasonable allowance as the board of commissioners may think right and proper. Neither of the acts referred to, passed since the act of 1855, repeals the twenty-fifth section of that act, nor is either of them in conflict with it. Whilst, then, the act of 1865, contains a re-enactment of the clause of the fifth section of the act of 1855, it must still be construed in connection with the twenty-fifth section of the latter act; and hence the words "extra services" cannot include fees in criminal prosecutions in cases of acquittal. But it is insisted that the word "acquitted," as used in the twenty-fifth section of the act of 1855, cannot include cases in which the accused are discharged upon a failure to prosecute.

Webster defines "acquitted" thus: "set free, or judicially

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discharged from an accusation, released from a debt, duty, obligation, charge, or suspicion of guilt." So that when a *nolle prosequi* is entered and the defendant discharged, he is acquitted of the prosecution. The proper judgment in such cases is, that the "defendant go hence acquit," &c. And we think it very clear that such is the sense in which the word is used in the act.

The words "extra services" were intended to cover such services as might be required of the clerk or sheriff officially, for the county or public, and for which no compensation is provided by law.

The fees of these officers in criminal prosecutions are definitely fixed and provided for; but as in cases of acquittal the defendant is not liable, and as neither the state or county is required to pay the fees in such cases, they are lost. This is one of the burdens incident to those offices, and the officers take the offices subject to them.

In these views we are fully sustained by the argument of PERKINS, J., in the case of *The Board of Com'rs of Miami Co. v. Blake*, 21 Ind. 32.

The claim of the appellee does not constitute a valid cause of action against the county.

The judgment is, therefore, reversed, with costs, and the cause remanded to the circuit court, with direction to dismiss the action.

W. R. Harrison and W. S. Shirley, for appellant.

S. Claypool, for appellee.

VAIL and Another v. JONES and Another.

PLEADING.—Answer.—Jurisdiction.—Code.—Under our code, a defendant may set forth in his answer as many grounds of defense, counter-claim, and set-

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off, whether legal or equitable, as he may have, without regard to the location of the subject-matter.

SAME.—Mortgage.—Suit on a note, in the circuit court of a certain county. Answer, that the note was given by the defendant to the plaintiff for money loaned by the latter to the former; that, to secure the payment thereof, the defendant executed to the plaintiff a deed, absolute on its face, but intended as a mortgage, for certain lands, of a value stated, in another county, in this State; that the plaintiff held possession of said real estate and refused to reconvey the same and give possession thereof on the payment of the note. *Held*, that the answer set forth a proper counter-claim within the meaning of the code, and the court thereby became invested with jurisdiction of the subject-matter.

APPEAL from the Dearborn Circuit Court.

GREGORY, J.—This suit was prosecuted, among other things, for the recovery of the amount secured by a note executed by the appellant John B. Vail to the appellee Samuel L. Jones.

Vail set up in his answer, that the note was given for money loaned by Jones to Vail; and that, to secure the payment thereof, the defendant Vail executed to the plaintiff Jones a deed, absolute on its face, but intended as a mortgage, for lands in Jasper county, describing them, of the value of five thousand dollars; that the deed was executed as a security for the payment of the note, and for no other consideration whatever; that the plaintiff Jones holds possession of the real estate and refuses to reconvey the same and give the possession thereof on the payment of the note.

The plaintiff replied by the general denial.

It was agreed between the plaintiff and defendant, in writing, on the trial, that there was due to the plaintiff Jones, on the note, \$908; that the jury should find only upon the issue whether the instrument purporting to be a deed was a mortgage; and that judgment and decree should be rendered upon the finding as the law might warrant.

The jury found for the defendant Vail, on this issue. On the plaintiffs' motion the court arrested the judgment on the verdict, on the alleged ground that the court had no jurisdiction of the subject-matter submitted to the jury. This

is the error assigned here. The code provides, that "actions for the following causes must be commenced in the county in which the subject of the action, or some part thereof, is situated: *First*. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest." 2 G. & H. 56. It was accordingly held, in *Parker v. McAllister*, 14 Ind. 12, that a complaint for specific performance must be commenced in the county where the land is situate; and in *The New Albany & Salem R. R. Co. v. Huff*, 19 Ind. 444, the same rule was applied to a suit brought to set aside a fraudulent conveyance of real estate.

Independent of the code, it is well settled, that where the court has jurisdiction of the proper parties, it may by its judgment or decree compel them to do equity in relation to lands located without its jurisdiction. See *Gardner v Ogden*, 22 N. Y. 327, and the authorities cited.

Has the code changed this rule, as to defendants? It is provided, that "the defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off, whether legal or equitable, as he shall have." 2 G. & H. 88.

In *Woodruff v. Garner*, 27 Ind. 4, it is correctly said, that "the counter-claim thus authorized comprehends recoupment, and much more. It hardly admits of question that it embraces, also, what was known as the cross-bill in equity against the plaintiff."

Jones could have commenced his action on the note and mortgage in Jasper county; he however elected, as he had a right to do, to sue on the note in Dearborn county. Is the defendant thereby cut off under the code from his counter-claim? The filing of a counter-claim is in no sense the commencement of an action. It is filed in a suit already commenced.

The New York code, from which ours was largely borrowed, uses the word "tried," instead of "commenced." It may be that the latter word was used in our code to harmonize with this provision as to the right of a defendant to

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set up any counter-claim, either legal or equitable, which he might have. One leading feature in the code is, that all matters in dispute between the plaintiff and defendant and relating to the same subject-matter may be litigated and settled in one action. In the opinion of a majority of the court, it is both the letter and spirit of the code, that a defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off, whether legal or equitable, as he shall have, without regard to the location of the subject-matter.

No possible harm can arise from this construction. The plaintiff still has his election of the *forum*, but he cannot by such an election deprive the defendant of his right of defense. A different construction leads to a multiplicity of actions, thereby greatly increasing the expense of litigation.

The court erred in arresting the judgment on the verdict.

Judgment reversed, with costs, and cause remanded, with direction to render the proper decree on the verdict.

ELLIOTT, J.—I cannot concur in the opinion of my brother judges in this case, pronounced by GREGORY, J., holding that the Dearborn Circuit Court erred in refusing to render a decree that the deed executed by Vail to Jones to the land in Jasper county was only intended as a mortgage to secure the note for six hundred dollars. My first objection to such a decree is, that the Dearborn Circuit Court has no jurisdiction of the subject-matter, as the land is situate in Jasper county. Section twenty-eight of the code provides, that "actions for the following causes must be commenced in the county in which the subject of the action, or some part thereof, is situated: *First.* For the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest, or for injuries to real property. *Second.* For the partition of real property. *Third.* For the foreclosure of a mortgage of real property."

The object of the answer setting up the fact that the note

was secured by the conveyance of the land in Jasper county by a deed absolute on its face, but which was only intended as a mortgage security, is clearly within the first clause of this section of the code. It seeks to determine the right or interest of Jones in the land under the conveyance. It is conceded, as it must be, that the Dearborn Circuit Court would have no jurisdiction to entertain an original action seeking the same relief claimed under the answer in this case; but it is claimed that, as it is set up by way of a counter-claim in the suit on the note, the Dearborn Circuit Court thereby became invested with jurisdiction to grant the relief prayed. It is true that the code authorizes the defendant to set forth in his answer as many grounds of defense, counter-claim, and set-off, whether legal or equitable, as he shall have; but certainly this provision was not intended to confer on a court jurisdiction over a subject-matter which by another provision of the code is expressly denied to it. Hence it does not follow, because the matter set up may, in some way, be connected with the cause of action, and might be the subject of an action in favor of the defendant, that it is, therefore, a valid counter-claim, when jurisdiction over the particular subject-matter of the claim is expressly denied to the court in which the action is pending.

Nor can I concur in the conclusion that the matter set up in the answer constitutes a counter-claim to the action on the note, within the proper meaning of the statute.

The answer does not claim to bar the action on the note, or to lessen the amount of the judgment claimed thereon by the plaintiff; nor does it seek to recover a personal judgment against the plaintiff.

The right, under the code, to sue on a note secured by mortgage without at the same time asking a foreclosure of the mortgage, is uncontrovertible. Both remedies may be joined in the same suit, provided it is brought in the county where the land lies; yet they are separate and distinct remedies. A suit to foreclose the mortgage is local to

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the county where the land is situate. The action on the note is transitory; it follows the person of the defendant, and must be prosecuted in the county where he resides.

Here the action was on the note alone, and simply sought a personal judgment against the defendant; of that action the Dearborn Circuit Court had jurisdiction. But, admitting that the conveyance of the land in Jasper county was intended as a mortgage, as alleged, still, as the land was not situate in Dearborn county, the circuit court of that county would have no jurisdiction of the subject-matter, and therefore could not render a decree of foreclosure.

As the suit is not upon the alleged mortgage, the matter set up as a counter-claim is not directly connected with the cause of action. It is foreign to it, or so remotely connected with it as not to come within the purview of the statute.

It is said in the case of the *National Fire Ins. Co. v. McKay*, 21 N. Y. 191, under a similar statute to our own, that "a counter-claim, when established, must in some way qualify or must defeat the judgment to which the plaintiff is otherwise entitled."

The question as to what constitutes a valid counter-claim under our statute was discussed to some extent in *Conner v. Winton*, 7 Ind. 523; *Lovejoy v. Robinson*, 8 Ind. 399; and *Slayback v. Jones*, 9 Ind. 470. It was held in the latter case, after a somewhat careful examination of the question, that the definition in our code of counter-claim is identical with the previous definition in the American reports of recoupment, and that it is the same thing. The subsequent cases on the subject were consistent with that ruling, until the case of *Woodruff v. Garner*, 27 Ind. 4, which was a complaint to obtain the rescission of a contract between the parties for the exchange of lands, on the ground that the contract was procured by certain false and fraudulent representations of the defendant. One of the paragraphs of the answer, in form a counter-claim, denied the fraud and alleged, among other things, that the plaintiff, without right,

kept the defendant out of the possession of the lands conveyed to him in pursuance of the contract, and prayed judgment for the possession and damages for occupation of the premises. A demurrer was overruled to that paragraph of the answer. In discussing the question raised by that ruling, treating the answer as a counter-claim, it is said that, "to say, as was inadvertently done in *Slayback v. Jones*, 9 Ind. 470, that the counter-claim is the same thing as recoupment, would be giving a definition obviously less comprehensive than that given by the statute. The counter-claim thus authorized comprehends recoupment, and much more. It hardly admits of question that it embraces, also, what was known as the cross-bill in equity against the plaintiff. Unless this be so, it would result that, in many cases, what formerly might have been fully settled in one litigation, would, under the code, require two or more separate suits to determine it."

It is not my purpose to question the correctness of the ruling in that case, in holding the answer good, but I think it was an error to call it a counter-claim under the statute. To do so is simply a misnomer of the pleading. Nor do I concur in the statement that, if "counter-claim," under the statute, does not embrace what was formerly known as the cross-bill in equity, it would result that, in many cases, what formerly might have been settled in one litigation, would, under the code, require two or more separate suits to determine it.

Notwithstanding the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished by the code, still where the right of action or the remedy sought is purely equitable in its character, it is none the less an equitable action under the code, and every matter which under the former practice might have been set up in such cases by way of a cross-bill may still be urged by an answer in the nature of a cross-complaint; but in many cases such a pleading would not constitute a counter-claim within the

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meaning of the statute. Section 802 of the code (2 G. & H. 336) provides, that "the laws and usages of this State relative to pleadings and practice in civil actions and proceedings, not inconsistent herewith, and as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force." This provision (if needed for that purpose) clearly saves to defendants in equitable actions the right to set up any matter in the answer in the nature of a cross-complaint which under the former practice could have been urged in a cross-bill. The code abolishes the distinction heretofore existing between suits in equity and actions at law, and the forms of pleadings, but it does not abolish the substance or change legal rights. The primary object of the code is, to simplify and render the remedy more easy, more prompt, and less expensive.

I think the judgment of the circuit court should be affirmed.

N. S. Givan, W. W. Tilley, and N. B. Taylor, for appellants.

D. S. Major and J. Schwartz, for appellee.

HUFFMAN V. STARKS.

STATUTE OF FRAUDS.—*Parol Lease.—To Commence in Futuro.*—A parol lease of lands for the term of one year, to commence thirty days after the making of the contract, is valid within the Statute of Frauds; and the lessee may maintain an action against the lessor to recover possession according to the terms of the lease.

SAME.—It seems that the parties to such a lease may have such remedies for violations of the contract as would appertain to violations of other valid contracts. *Stackberger v. Mosteller*, 4 Ind. 461, questioned.

APPEAL from the Elkhart Circuit Court.

FRAZER, C. J.—This was a suit upon a parol lease of lands for the term of one year, to commence some thirty days af-

ter the making of the contract. The action was by the lessee against the lessor, to recover possession, the facts being stated in the complaint circumstantially. The court below sustained a demurrer to the complaint, and the plaintiff appeals.

The only question to which our attention is invited is, whether the contract is within the Statute of Frauds, 1 G. & H. 349-50.

It is certainly as plain as anything can be, that, under the statute, a parol lease for a term not exceeding three years is valid, whether executed by taking possession or not. There is no room for argument about that proposition; and it follows, that the lease stated in the complaint was a valid lease. By its terms, the lessee was to have possession of the premises, and the lessor would be entitled to the rents. If binding upon one party, it was likewise binding upon the other. If valid as a lease, it must give the lessee the right to occupy the premises according to its terms and conditions, and a remedy of some kind for the privation of that right would follow. It is a solecism to say that the contract was obligatory, and yet that it cannot in any manner be enforced. What the remedy for its enforcement is, remains the only question, then, necessary to the decision of the case before us. It is a general proposition, that one who is entitled to the possession of real estate may recover such possession by a suit for that purpose; and we know of no authority or reason for making a lessee an exception to that rule. Possession is the specific thing for which the lessee contracted, and if the law will not give him that, or damages for its privation, it is not perceived how the contract can be held to be binding upon the lessor.

The appellee relies upon *Stackberger v. Mosteller*, 4 Ind. 461. That case was assumpsit by the lessee against the lessor upon a parol lease for a year, to commence about sixty days after the making of the contract. It was sought to recover, not possession, but damages for refusing to give possession, and it was held, on the authority of *Inman v.*

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Stamp, 1 Stark. 12, that the action of assumpsit would not lie. *Inman v. Stamp* was assumpsit by the lessor against the lessee for not occupying the premises according to a parol lease. It was a *nisi prius* case, and it was held, that the suit would not lie. The case was commented upon in the Exchequer, in *Edge v. Stafford*, 1 C. & J. 391, and recognized as being well decided under the English Statute of Frauds, 29 Car. II. c. 3. It was distinguished from *Riley v. Hicks*, 1 Stra. 651, in which it was held, where the suit was to recover rent, that a parol lease to commence *in futuro* is valid if it do not exceed three years from the making. *Edge v. Stafford* was assumpsit against the tenant for failure to take possession and pay rent under a parol lease for two years, to commence a fortnight in the future. It was held, following *Inman v. Stamp*, that the action would not lie. It was admitted that the demise was valid, and that *Riley v. Hicks* was correctly decided, and it was conceded that if such a parol lease contained an unqualified promise to pay rent, the lessor might recover the rent though the tenant refused to occupy. And it was said, that whatever remedy can be had upon such a lease, in its character of lease, may be resorted to.

The doctrine to be deduced from these cases is, that where there is a valid parol demise, and an unqualified promise to pay rent in consideration thereof, the possession may be recovered by the tenant, and the rent may be recovered by the landlord, these being remedies attaching to it "in its character of lease," to borrow the language of *Edge v. Stafford*; but mere damages are not recoverable for withholding the possession from the tenant, nor for his refusal to occupy. It must be conceded that it is not easy to find a satisfactory basis for this distinction in either the letter or spirit of our Statute of Frauds. The lease is undoubtedly valid, and there is nothing in our statute indicating a purpose to deny to the parties such remedies for violations of the contract as would appertain to violations of other valid contracts. The English statute is couched in phraseology

not quite as plain as ours. Under that there is some room for holding that the second section, which excepts leases not exceeding three years from the operation of the first section, does not except them from the operation of the fourth section, which denies any action to charge any defendant upon a contract for the sale of any interest in lands, or which is not to be performed within a year, unless such contract is in writing. And Mr. Chitty supposes this to be the ground upon which the English cases are put. Chit. Con. 345. But a more recent case in the King's Bench, *Bolton v. Tomlin*, 5 Ad. & E. 856, denies this doctrine, and its reasoning seems inconsistent with *Inman v. Stamp* and *Edge v. Stafford*, and intended to question those cases.

There is not, however, in our Statute of Frauds, as it seems to a majority of the court, any opportunity for a construction which will hold such leases valid and yet deny a right of action for their violation. It is merely enacted that no action shall be brought in certain cases, enumerating them, unless the contract be in writing, "excepting, however, leases not exceeding the term of three years." It would violate all known rules of construction to say that the exception only applies to a part of the section in which it is found. Indeed, this statute is, in this particular, so plain that there seems to be no room for construction. We are constrained to believe that the case in 4 Ind. was decided without giving close attention to its language. That interpretation of the English statute was, to say the least, of very doubtful soundness, and could only be maintained upon a basis of reasoning which was exceedingly artificial. That this was felt in the Exchequer, must be obvious upon a careful reading of the opinion in *Edge v. Stafford*. If questionable there, it must be wholly inadmissible here. This subject has received the attention of the Court of Appeals of New York, under a statute like ours, where leases for a limited period are excepted from the provisions which constituted the first and fourth sections of the English statute;

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and there was no hesitation in holding that the contract was valid in law for every purpose. *Young v. Dake*, 1 Seld. 463.

Judgment reversed, with costs, and cause remanded, with direction to overrule the demurrer.

GREGORY, J.—I do not agree with the majority of the court in the opinion just pronounced.

In my judgment, *Stackberger v. Mosteller*, 4 Ind. 461, is decisive of the question involved in the case at bar. If a suit will not lie upon an oral agreement for such a lease on account of the refusal of the lessor to deliver possession of the premises at the time appointed, it is difficult to see how an action for the possession can be maintained by the lessee whilst the agreement to let is executory, and not consummated by the taking possession.

Mr. Washburn, in his work on real property, says, "It remains to consider the effect of the statute of frauds upon parol leases, as it will be found that these vary essentially in their provisions in respect to such leases. But it is believed they all, with the exception of New York, agree in this, that if the agreement to let be executory, and not consummated by the lessee's taking possession, it cannot be enforced; if it be by parol the statute prohibits any action upon such a contract." Washb. Real Prop. b. 1, ch. 11, § 2, 31.

In the well considered case of *Edge v. Stafford*, 1 C. & J. 391, the court say, "the Statute of Frauds provides, that no action shall be brought whereby to charge any person upon any contract or sale of any lands or any interest in or concerning them, unless such contract were in writing; and in *Inman v. Stamp*, Lord ELLENBOROUGH ruled, that a contract for letting lodgings was a contract for an interest in lands; and that an action could not be maintained against the party who had refused to perform his agreement for taking them, because there was nothing to bind him but a verbal agreement. It was supposed, upon the argument, that *Ryley v. Hicks*, Stra. 651, was at variance

with *Inman v. Stamp*, but I cannot see what bearing one of those cases has upon the other. The only point decided in *Ryley v. Hicks* is, that a lease, though it were to commence *in futuro*, would be within the exception in the Statute of Frauds, if it did not exceed three years from the making; but how that bears upon the decision in *Inman v. Stamp*, I do not see. It may be said, that it is strange that the second section of the statute has made a lease for less than three years from the making valid, and yet, that no action shall be maintainable upon it until it is made effectual as a lease by the entry of the lessee; but, first, the legislature might intend to make a distinction between those cases in which the complaining party was contented to confine himself to its operation as a lease, and sought nothing more than as a lease it would give him, and those in which he went further, and founded upon it a claim for damages, which might far exceed what he could claim under it in the character of a lease; or, secondly, this distinction might not have been contemplated, but may be the result of the true construction of the statute of frauds." Again, the court say, "the defendant, by the lease, has an *interesse termini* only; the agreement upon which the action is founded, is to force him to take an ulterior interest, and clothe himself with the possession."

The agreement to deliver possession of the premises in the future constitutes no part of the term as such, and is distinct from it.

It is this agreement to deliver the possession of the premises in the future which is rendered void by the Statute of Frauds. It is an interest in land, and must be in writing to be valid. It is not enough to say that it is an incident of the lease as such, and that the lease cannot be valid without this incident; that argument is fully met and answered in *Edge v. Stafford*, *supra*.

It is difficult to see any distinction between our Statute of Frauds and the English statute. In the latter, leases not exceeding three years from the making are declared

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valid by an independent section, applying to the whole act; in the former, such cases are excepted out of the operation of the statute. It would seem but fair to hold that the English statute is as broad as our own.

H. D. Wilson and J. D. Osborn, for appellant.

A. S. Blake and R. M. Johnson, for appellee.

CLEM v. THE STATE.

CRIMINAL LAW.—Evidence.—Venue.—If in a criminal case there be no evidence that the offense charged was committed within the jurisdiction of the court, there should be an acquittal.

SAME.—Admissions on the Trial.—Bill of Exceptions.—In a criminal case, the court, in its instructions, told the jury, that the defendant had, during the progress of the trial, admitted certain important facts, and that the facts thus admitted must be taken as if proved beyond a reasonable doubt. A bill of exceptions, purporting to contain all the evidence, was silent as to such admissions having been made.

Held, that, as the record stood, there was no warrant for this statement of the court.

SAME.—Jury.—Instructions to.—Right of to Determine the Law.—The court in such case also instructed the jury, that it was their *duty* to apply the law, as given by the court, to the facts of the case; that they might determine the law for themselves, however; but that they should be *well satisfied in their own minds* of the incorrectness of the law as given by the court before assuming the responsibility of determining it for themselves.

Held, that this was error.

SAME.—Irrelevant Instructions.—Instructions to the jury should be applicable to the evidence.

SAME.—Presumptions.—Use of Deadly Weapon.—Contradictory Instructions.—The intent to murder is not conclusively inferred from the deliberate use of a deadly weapon; and the error of giving an instruction to the jury to that effect on the trial of an indictment for murder, at the instance of the prosecution, is not cured by giving a contradictory and correct charge upon that subject at the request of the defendant.

31	480
140	308
31	480
153	564
31	480
154	587
31	480
168	597
31	480
187	330
31	480
171	645

SAME.—Apparently Conflicting Instructions.—In a criminal case, the court, instead of giving to the jury instructions which are apparently conflicting, though not so intended, and leaving the jury to conjecture which of them should be applied to a given state of facts, should generally tell the jury the state of facts to which the proposition of law announced is applicable.

APPEAL from the Warren Circuit Court.

The appellant was indicted for murder in the first degree. Upon a plea of not guilty, the jury found him guilty of manslaughter, and that he be confined for three years in the state's prison.

The court overruled a motion for a new trial and a motion in arrest of judgment, and rendered judgment in accordance with the verdict.

The evidence tended to prove that the appellant, in an altercation with one James H. Beckett, inflicted wounds with a knife, from which Beckett soon afterwards died.

FRAZER, C. J.—This case must be reversed for various reasons.

There was not a particle of evidence that the offense charged was committed within the jurisdiction of the court below. This, doubtless, was an oversight, but without such evidence there should have been an acquittal.

Then the court in its instructions told the jury, that the defendant had, during the progress of the trial, admitted certain important facts, and that the facts thus admitted must be taken as if proved beyond a reasonable doubt. Now, if such admissions were made, they were evidence, and yet a bill of exceptions purporting to contain all the evidence is wholly silent as to such admissions having been made. We must look to the bill of exceptions for the evidence, and (though we may apprehend that there was an oversight in this respect in making it up) we are compelled to hold, as the record stands, that there was no warrant for the statement of the court.

But, to come to what may be deemed the merits of the

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case. The jury was instructed that it was their *duty* to apply the law, as given by the court, to the facts of the case; that they might determine the law for themselves, however; but that they should "*be well satisfied in their own minds* of the incorrectness of the law as given by the court before assuming the responsibility of determining it for themselves." This instruction, carefully analysed, is in direct conflict with the provision of the Constitution of the State, that "in all criminal cases the jury shall have the right to determine the law," and with the oath of the jury, by which each juror binds his conscience to render a true verdict according to law. Now, the jury in this case were told, in effect, that the law as given by the court must be their inflexible guide, though, tested by their best judgment, it was erroneously given—unless it was quite clear to their minds that the court was wrong. In other words, they must be "well satisfied" that their own opinion of the law was correct before they could act upon it, if the court had expressed a different opinion. The result of this would be, in some cases, that a jury would be compelled to bring in a verdict not in accord with its own judgment of the law—that, though by express provision of the Constitution it is made the judge of the law of the case, it must, nevertheless, be governed, sometimes, by the opinion of the judge, notwithstanding that differs from its own.

The judge is required by statute, in criminal cases, to instruct the jury in the law. The consistent theory is, that this is for the information of the jury, to aid it in forming an opinion for its own guidance. If the judge adorns his high place by his learning and impartiality, his juries will be apt to rely upon his instructions, because they will deem them correct. They may reasonably rely upon him as a trustworthy source of information concerning the law, as they would upon a truthful witness concerning the facts—not because any rule of law requires that they must, but because their own common sense suggests the credit due to

the legal opinions of such a judge. But, on the other hand, a magistrate destitute of character for either knowledge of the law or uprightness in its administration, and who so deports himself during the trial as to destroy confidence in his fairness, will not be so apt to command the confidence of his jury. He would not be worthy of it. Distrust would, in such a case, result from the exercise of sound judgment. The constitutional provision means, that in criminal cases juries shall be free to exercise this judgment. It does not proceed upon the presumption that all judges know the law and will impartially declare it, but, on the contrary, its necessity was suggested by circumstances which proved that this was not true. Judges had, in England, stained the ermine by using their position to secure the conviction of citizens in defiance of law, to serve the purposes of party. It might be done again, and here. We were entering upon the experiment of an elective judiciary, under which judges might be chosen for partizan services, and might be too ready to serve the interest that had given them position. Criminal prosecutions had ever been a favorite resort of those in power in times of high excitement. It would be some security against possible abuses, to put the ultimate function of judgment of the law as well as the facts in the hands of the jury, drawn from the body of the county; and hence it was done. It is enough that it is so written. The courts have no authority to modify it, for that would be to defeat, in a measure at least, the end which it was designed to secure. It is too plain for construction, and if evils shall result from giving it full effect, the appropriate remedy must be sought elsewhere than in the courts.

It is true, that upon this subject a correct instruction was given at the request of the defendant. But that did not repair the error. Contradictory instructions would, if allowed, make the trial by jury a most mischievous institution.

The seventh instruction given at the request of the prosecution should have been withheld, for the reason that there

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was no evidence at all to which it could be properly applied. If it had any effect, it must have been to confuse the jury.

The following was given at the request of the prosecution:

"6. Every sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts; and, therefore, the intent to murder is conclusively inferred from the deliberate use of a deadly weapon."

This, though transcribed from an approved text-book (1 Greenl. Ev. § 18), is not sustained by the authorities which the writer cites in its support. It is entirely at variance with principles which have received the uniform sanction of all the courts in this country and Great Britain. It is a great inaccuracy, and it is strange that a book which has passed through so many editions should still contain it. A conclusive presumption admits of no proof to rebut it; and murder is a felonious killing. Such is the technical as well as popular meaning of the significant terms used in the instruction. The purport of it, then, is, that if the defendant killed the person named by the deliberate use of a deadly weapon, no evidence to show that the act was done in his necessary self-defense can be sufficient to rebut the presumption, or to prove that the killing was excusable and not felonious. Evidence for that purpose was offered and admitted; and, indeed, that seems to have been the defense relied on. It can therefore be readily seen how fatal to the rights of the defendant this charge was, if followed by the jury. Nor was this error cured by giving a contradictory and correct instruction upon the subject, at the request of the defendant.

We find occasion in this case to say that the practice of giving apparently conflicting instructions, though not really so intended, and leaving the jury to conjecture which of them should be applied to a given state of facts, is not favorable to the correct administration of justice. The court should generally tell the jury the state of facts to which the proposition of law announced is applicable. Then there

will be no seeming conflict in the instructions, to embarrass, confuse, and mislead. In this case, the court remarked to the jury, that "it may appear to you that there is some conflict; but it is necessary to submit to you the law as it might be applicable to the different views of the evidence as to the facts in this case, which it is the exclusive province of the jury to determine; and it will, therefore, be your duty to construe all the instructions together." This appearance of conflict should have been avoided as we have suggested; and then the task of construing the instructions together would have been possible and easy. We need not lengthen this opinion by specifying the particulars doubtless alluded to by the judge below, which called for these observations upon the subject.

Reversed, and remanded for a new trial. Prisoner to be returned.

D. W. Voorhees, T. F. Davidson, and J. McCabe, for appellant.

D. E. Williamson, Attorney General, for the State.

STEVENS v. THE STATE.

CRIMINAL LAW.—Insanity.—Where a person is moved to the commission of an unlawful act by an insane impulse controlling his will and his judgment, he is not guilty of a crime; and if he is a monomaniac on any subject, it is wholly immaterial upon what subject, so that the insane impulse leads to the commission of the act.

SAME.—Knowledge of Right and Wrong.—On the trial of an indictment for murder in the first degree, the court instructed the jury, that if they believed from the evidence "that the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that such act was one which he ought not to do, and if that act was at the same time contrary to the law of the State, then he is responsible for his acts."

Held, that this is not law.

31	485
135	321
31	485
144	490

Stevens v. The State.

SAME.—So far as a person acts under the influence of mental disease he is not criminally accountable; and the jury in a criminal case must be satisfied beyond a reasonable doubt of the defendant's mental capacity to commit the crime charged.

APPEAL from the Vigo Criminal Circuit Court.

GREGORY, J.—The appellant was indicted in the court below for murder in the first degree. He pleaded "not guilty," and was tried by jury; verdict guilty, affixing the death penalty.

The defense was insanity. The evidence as to insanity was slight, but sufficient to carry the question to the jury. The motion for a new trial was based upon alleged errors of law occurring at the trial, in the instructions of the court to the jury.

At the instance of the prosecuting attorney, the court instructed the jury, that, "in order to excuse a man for killing another on the ground of insanity, it must appear to the satisfaction of the jury, that he was either absolutely insane at the time of the act, so that he did not know the difference between right and wrong; or that he was laboring under some form of monomania by which he was irresistibly impelled, by an uncontrollable will, to the perpetration of the act; *but such monomania must be in relation to the act of killing, for if it is monomania upon some other subject, it does not excuse a killing.*

"If a man becomes a monomaniac on account of the morbid state of his domestic affections, or if he becomes so on account of the morbid state of his religious feelings, in either case his moral sense is only affected by the cause of his disease; that is, he is only excused from the commission of crime so far as he acts under the irresistible influence of the particular monomania under which he is laboring; *and if, although laboring under either of said forms of monomania, he shall kill a man with premeditation, malice, and purpose, he would be without excuse, and would be guilty of murder in the first degree.*

"In order to excuse a man for the commission of a crime,

on the ground of monomania, it must appear that the monomania had relation to the particular crime committed; and if it was monomania upon any other subject, it would be no excuse.

"When a man kills another *without having given any previous indications of insanity*, and afterwards so acts as to appear to be insane, the jury should consider this fact, to determine whether insanity is not simulated, or pretended, and if they find that it was pretended, it should not weigh anything in their decision of the question of guilt or innocence."

It is claimed that the parts of these instructions italicized are erroneous.

At the request of the defendant, the jury were instructed, that "if they believed from the evidence that when the prisoner committed the act charged in the indictment he was laboring under any irresistible and uncontrollable mental delusion, impelling him to do said act; that he was at the time of the perpetration of said killing in such a state of mind as to be unable to control his will and his actions in regard to the act so committed; then, in judgment of law, he was insane, and could not be guilty of the offense of murder charged in the indictment; and he is consequently entitled to a verdict of not guilty.

"If the jury believe from the evidence that, at the time of committing the act charged in the indictment, the prisoner was moved thereto by an insane impulse, controlling his will and his judgment, an impulse too powerful for him to resist; and said insane impulse arose from causes physical or moral, or from both combined, not voluntarily induced by himself; under such circumstances the jury cannot find the defendant guilty as charged."

The defendant asked, at the proper time, the following instruction: that "if the jury entertain a reasonable doubt as to the soundness of the mind of the prisoner at the time of the commission of the homicide charged, he is entitled to the benefit of that doubt, as he would be to the benefit of a doubt as to any other material fact in the case; it being,

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under the statute of this State, a necessary ingredient of the offense, that the person charged shall at the time of the commission of the offense be of sound mind; and if the evidence shows that the prisoner, at the time of the commission of the act, was not of such sound mind, although the jury may believe he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life, even at the time of the commission of the offense, they cannot find him guilty." The court refused to give the instruction as asked, but, over the objection of the defendant, gave it with this qualification: "If the jury believe from the evidence that the defendant knew the difference between right and wrong in respect to the act in question; if he was conscious that such act was one which he ought not to do; and if that act was at the same time contrary to the law of the State; then he is responsible for his acts."

It is undoubtedly the law, as charged by the court below, that if the defendant was moved to the act by an insane impulse controlling his will and his judgment, then he was not guilty of the crime charged. And if the defendant was a monomaniac on any subject, it was wholly immaterial upon what subject, so that the insane impulse led to the commission of the act.

It is claimed that the instructions as to this point given by the court at the instance of the State's attorney were calculated to mislead the jury, and two members of this court are of that opinion. It is clear that the instructions might have been put in better form, but I have no doubt that they are correct law as they were intended by the court to be understood, and particularly as explained by the court in the instructions asked by the defendant. But if this case turned upon that question, I should hesitate to determine that a jury might not have been misled by instructions about the meaning of which there is a difference of opinion among the members of this court.

It is claimed that the court erred in the instruction in

reference to simulating insanity after the commission of the act, in assuming that the defendant had given no previous indications of insanity. There was some evidence of previous indications of insanity, but we do not understand the instruction as making any such assumption. The instruction may not have been applicable to the case made, and may have misled the jury.

But we are clear that the court below erred in giving the qualification to the instruction asked by the defendant.

The statute provides, that "if any person of sound mind shall purposely and with premeditated malice, kill any human being, such person shall be deemed guilty of murder in the first degree." 2 G. & H. 435, sec. 2.

The legislature have defined the meaning of the expression, "persons of unsound mind." It is provided that this phrase "shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person." 2 G. & H. 573-4, sec. 1.

The great difficulty has been, in cases of partial insanity, to fix the standard of criminal responsibility. The leading case in this country is the *Commonwealth v. Rogers*, 7 Met. 500. Chief Justice SHAW, in his charge to the jury in that case, said, "the difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right,

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injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, *and a mental power sufficient to apply that knowledge to his own case*, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility from criminal acts."

As we understand this charge, it does not go to the length of fixing the test of "a knowledge of right and wrong;" it recognizes the necessity of a mental power sufficient to apply that knowledge and act accordingly. The charge is by no means clear, and we think that it is not entitled to the weight usually awarded it.

The law was much better put by Judge BREWSTER in *Commonwealth v. Haskell* (See 4 Am. Law Rev. 240), thus: "that the true test lies in the word, power. Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and to avoid the wrong? Has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate?"

Indeed, there are very strong reasons for holding, that the charge of Chief Justice PERLEY, in the *State v. Pike* (See 4 Am. Law Rev. 245-6), is the true law on this subject. He instructed the jury, "that the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing, and escaping or avoiding detection, nor ability to recognise acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury."

The argument that leads strongly to this conclusion is to

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be found in the able dissenting opinion of Judge DOB, in *Boardman v. Woodman*, 47 N. H. 120 (See p. 146 *et seq.*).

It is not necessary for us to go this length in the case in judgment.

In a criminal case, the jury must be satisfied beyond a reasonable doubt of the defendant's mental capacity to commit the crime charged. This is but an application of the general principle, that the criminal intent must be proved, as well as the act; that without a capable mind, such intent cannot exist, the very element of crime being wanting. Such terms as "criminal intent," "vicious will," and "use of reason," are used in a very broad and general sense, including the idea that the mind must be in such a reasonable condition as to be capable of giving a guilty character to the act. The will does not join with the act, and there is no guilt, when the act is directed or performed by a defective or vitiated understanding. So far as a person acts under the influence of mental disease he is not accountable.

We wish in this case to be understood as simply holding that the qualification of the instruction asked by the defendant was not law, and for this reason the court below ought to have granted a new trial.

Judgment reversed, cause remanded, with directions to grant a new trial, and for further proceedings.

ELLIOTT, J., was absent.

J. P. Baird, C. Cruft, W. E. McLean, and J. N. Pierce, for appellant.

R. W. Thompson and D. E. Williamson, Attorney General, for the State.

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INSTRUCTIONS TO JURY.—Conflict of.—An erroneous instruction to the jury in a criminal case cannot be corrected by another instruction which states the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury.

SAME.—Extracts from Books.—The law which goes to the jury from the court should be given as law, unquestioned by authorities extracted from books.

REASONABLE DOUBT.—A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt as to the guilt of the accused—that is, unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests, under circumstances where there was no compulsion resting upon him to act at all. *Arnold v. The State*, 23 Ind. 170, explained.

SAME.—On the trial of an indictment for murder in the first degree, the court instructed the jury, in effect, that if the evidence satisfied them of the guilt of the defendant with such certainty that a prudent man would feel safe in acting upon such conviction in his own important affairs, then, in such case, there would be no reasonable doubt of the defendant's guilt.

Held, that this test was too narrow.

INSANITY.—The defendant in a criminal case is not required to *prove* his insanity in order to avail himself of that defense, but merely to create a reasonable doubt on this point, whereupon the burden of proving his sanity falls upon the state.

SAME.—Cognitive and Conative Faculties.—Insanity is a disease which may impair or totally destroy either the understanding or the will, or both; and in a criminal case all symptoms of such disease and its effect upon these faculties should go to the jury, and they must determine, as a matter of fact, the mental condition of the defendant; and an instruction to them which limits their inquiry to the condition of the power to apprehend by the understanding is erroneous.

SAME.—Voluntary Drunkenness.—Continued Drunkenness.—Voluntary drunkenness is no excuse for the commission of a crime, but insanity produced by continued drunkenness is a good defense in a criminal action.

SAME.—Hereditary.—Evidence.—Evidence of the insanity of the mother and uncle or other relatives of the defendant in a criminal case must be disregarded, if there be not other evidence tending to show that he was himself insane at the time he did the act charged.

PRESUMPTION.—Use of Deadly Weapon.—The intent to murder is not conclusively presumed from the deliberate use of a deadly weapon.

*This opinion was rendered at the beginning of the May Term, 1870.

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WITNESS.—*Discredit of by the Court.*—An attempt in an instruction to the jury in a criminal case to cast discredit upon a medical witness because he had attended the trial from a neighboring state to testify in behalf of the defendant with the expectation that his expenses would be paid by the defendant or others for him, the defendant being a stranger to such witness, was disapproved.

APPEAL from the Switzerland Circuit Court.

RAY, J.—Cincinnatus Bradley, the appellant, was indicted for murder in the first degree. He changed the venue from before the judge, on account of alleged bias and prejudice. A judge of another circuit was called by Judge Berkshire to try the cause.

A jury found the defendant guilty of murder in the second degree, and that he be sentenced to the penitentiary during life. Motion for a new trial overruled; motion in arrest of judgment overruled; judgment on the verdict.

The evidence shows that the defendant and the deceased were, on the 20th day of September, 1868, living with their families in different parts of the same house, which was owned by the defendant; that no serious quarrel or ill feeling had ever existed between them; that deceased was sitting in the yard, smoking and reading, while the defendant was engaged in driving hogs out of the yard, in doing which he became greatly enraged; and, after knocking one of the hogs down with a boulder, and throwing it over the river bank, he went into the house, declaring his intention to get his pistol and shoot the deceased; that he came out with his pistol, and deceased was seen with his stool in his hand, coming toward the house; and that when deceased was from fifteen to thirty steps from the porch, the defendant fired from where he stood on the porch, the ball hitting deceased in the right side of the chest, penetrating the lungs and inflicting a severe and dangerous wound. The deceased fell when the shot was fired. The evidence is conflicting as to whether his lower extremities were paralysed by the wound or not—some witnesses saying that they were, and others that they were not.

After the shot, defendant offered to assist the wife of the

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wounded man to carry him into the house, saying that he had shot him, and was sorry for it. But the wife refusing to let him assist, he said he had shot him, and was glad of it.

The defendant and his wife then started with their child to the river, and endeavored to get across, first on the ferry-boat, and, on being refused a passage, then by taking a skiff that was lying on the shore; and after putting his wife and child into it and trying to push off, he was prevented by those present, and said that he had done what he had to the deceased in self-defense; and that he did not want to be arrested on Sunday; and if they would let him go to Kentucky he would return the next day and answer for what he had done. Upon returning to his house, he was arrested, and the pistol—one of Sharpe's patent, four-barrelled pistols—taken from him, three barrels being loaded, one empty, and a bottle of whiskey about half full. After his arrest he made an effort to get away, caught the sheriff by the beard, and struggled with him. When at the magistrate's office he asked the officer who had charge of the pistol for it, for the avowed purpose of getting the barrel from the stock and throwing it away. Afterwards he spoke of being admitted to bail in some small amount, and of his ability to give it; and while in jail he made an offer of eight thousand dollars to the sheriff, if he would not lock him up. This offer was in writing. He employed a physician to attend upon the deceased, and paid five hundred dollars; he employed and broke with several attorneys, to each of whom he agreed to pay not less than five hundred dollars.

In the meantime, the deceased, being wounded severely, was carried first into his own house, where he remained several days; then he was carried to the house of Mr. Jennings, where he again remained some weeks, and seemed to be improving, when he was a second time removed, this time to the house Mrs. Salinda Plew, from which time he grew worse until he died, about ten weeks after he was shot. Before his last removal his appetite was good, his wound closed, his limbs recovered their motion, and he seemed

likely to recover. After his removal he grew worse, acute inflammation of the lungs setting in, resulting in suppuration and finally in death. There was testimony tending to show that his death was caused by this inflammation, and not by the wound; and whether the shot or other causes produced his death, was a question fiercely debated upon the trial.

The shot was inflicted, and the deceased died, in Switzerland county.

If the death should be found to have been caused by the wound inflicted upon the deceased by the defendant with the pistol, then the defense relied upon was, that he was insane at the time the fatal shot was fired, and, consequently, *incapax doli*.

The evidence adduced by defendant upon this point, stated in a very general way, tended to establish the following facts:—

1. That his mother became and was insane for twenty years before her death, being at first wild and maniacal, but as she grew older becoming more quiet, and finally settling into a state approaching *dementia*, in which condition she died. The defendant was about ten years old when she became insane, and was thenceforth, until he was over twenty, in the almost exclusive company of his mother, who in her fondness for him was in the habit of taking him out on the banks of the river and spending whole days building houses for him of sticks.

2. That William Gray, the twin brother of defendant's mother, became insane, and for a long time sought opportunities to destroy his own life, in which, though often prevented by the vigilance of his relatives, he finally succeeded, by shooting himself to death. His insanity is traced to no known cause so far as the evidence discloses.

3. That defendant's sister—half-sister, by his father—was also insane, and when last heard from confined in a lunatic asylum in Connecticut. Her insanity is not well defined,

or rather is not characterized by the witnesses; but it was total and undoubted.

4. That Hugh Manfred, a cousin of defendant, had become insane in consequence of an injury inflicted by a horse tramping upon his head; but he subsequently partially or wholly recovered.

5. That defendant himself, when a mere child, had been seized by some disease in the legs, which confined him for five or six years to his room and bed; and when he partially recovered the use of his limbs, he was seized with a disease of the spine, which resulted in a great and permanent curvature of the spinal column, and confined him to the house and bed until he was nearly or quite sixteen years of age; that his sickness had up to that time precluded all attempts to educate him; and, although upon his recovery so far as to be able to go about his father made great efforts to educate him, his mind was so weak and imbecile as to render them utterly unavailing; that his mind remained that of a mere child until after he was twenty years old; and that being now over thirty, he never has acquired any facility in reading or writing.

The evidence tends to show that for the last seven or eight years, and according to some of the witnesses, for ten, he had been a constant, habitual, and excessive drinker of alcoholic stimulants; and had been, in fact, during the seven or eight years immediately before the shooting, constantly drunk—an habitual drunkard. On this point there is almost no contrariety in the evidence. There is evidence tending to show that the small amount of mind he originally had was by this inveterate habit of drunkenness still further weakened and impaired, until his memory was almost entirely destroyed; one of his attorneys testifying that he could not remember what might occur in relation to his business between them from one consultation to another, although such consultations often occurred within a day or two of each other, and sometimes even on the same day; and that when he would have some one writing a letter for

him, he could not remember what he desired to have written in the letter, after he had begun it. The evidence also showed that, being poor, he had recently before the shooting was done become the heir or legatee of a wealthy relative, and was in consequence raised from poverty to opulence in a day. Succeeding this change in his circumstances, his habit of drunkenness and its injurious effect on his mind seem, according to the testimony of some of the witnesses, to have become, if possible, more deeply marked.

He was, just before and during the trial, examined by at least four physicians, who also heard the evidence touching the insanity of his mother, her brother, defendant's sister, and cousin, as well as that unfolding his own previous life, habits, and condition, all of whom concurred in the opinion, which they delivered as experts, that the facts proved in relation to defendant's mother, uncle, sister, and cousin, tended strongly to prove that insanity was hereditary in the family of the defendant; and that the defendant himself was insane at the time he shot the deceased. They also testified, upon a hypothetical case, involving substantially the facts proved, and of which there was evidence to go to the jury, that the defendant was insane at the moment of the fatal act; and that his appearance in court and at the jail strengthened, rather than weakened, their conclusion as to his insanity.

There was little if any evidence tending to show any cause why the defendant shot Evans. Indeed, so far as the evidence discloses the relations of defendant and deceased, they had always been friendly, and the act went to the jury apparently without a motive.

The State introduced proof tending to show that defendant's mother did not become insane until he was about ten years old; and that the immediate cause of her insanity was the death of two children, who both died at the same time.

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The State also introduced evidence of eight or ten, or it may be more, of defendant's acquaintances and neighbors, who testified that up to the time of the shooting they had severally known the defendant for a longer or shorter period, had noticed nothing unusual in his manner or appearance, and that they did not regard him as insane.

We proceed to the consideration of the charges given by the court in relation to insanity, and those that on general principles must be held to apply to and give point to the same. They are as follows:—

“2. The law presumes all persons to be of sound mind, and in a charge of murder it is not necessary for the State to prove, to make out the offense, that the accused was not insane. If it is claimed that he was, the defendant must prove the fact in his defense.

“4. The act must be done intentionally; and I instruct you that a sane man is conclusively presumed to intend the natural and probable consequences of his own acts, and the intent to murder is conclusively inferred from the deliberate use of a deadly weapon.

“6. The rule of law is, that if from the evidence in the case the jury have a reasonable doubt as to any material fact going to the defense, or necessary to make the cause, the prisoner is entitled to the benefit of the doubt. But you cannot go out of the evidence to hunt for doubts; but the doubts, if any exist, must arise out of the evidence in the case. By a reasonable doubt, in law, is intended this: when the evidence is not sufficient to satisfy the judgment of the truth of a proposition, with such certainty that a prudent man would feel safe in acting upon it in his own important affairs. And, if the evidence in the case, upon any material point for the State and defense considered, does not satisfy your judgment of the truth of all material propositions in the case, and of the criminal liability of the defendant, with such certainty that a prudent man would feel safe in acting upon said matters in his own important

affairs, then, in such case, there would be a reasonable doubt in the case, within the meaning of the law as to reasonable doubts in criminal cases.

"9. To constitute the defense of insanity so as to excuse the defendant from the punishment imposed by law for the offense charged, it is not sufficient to show a weakness of mind only; but it is necessary to prove such a deprivation of the reasoning and mental powers, at the time of the killing, as shows that the defendant did not know the consequences of his act, and that it was a wrong, and that it was illegal.

"10. If the defendant, at the time he did the act charged, knew what he was doing, and that it was wrong, and a violation of law, then he is liable to punishment for it, like any other person. The law will not weigh or consider the different grades of intellect, but will punish the weak as well as the strong in mind—if there exists sufficient mind to know and understand the nature and consequences of the act.

"11. Whether the defendant knew what he was doing at the time he fired, depends upon all the evidence in the case; and in this connection you may consider any attempt, if proved, to flee from the State soon after the doing of the act.

"12. Voluntary drunkenness is no excuse for the commission of a crime, and cannot be set up as a defense.

"13. Continued drunkenness, producing insanity, may be proved; and if the insanity exist to such an extent that the party's mind cannot will or determine to do the act, or does not know the consequences of his act, and that it is wrong, then, in such a case, he would not be liable. But a mere voluntary drunkenness, no matter how much it may excite the accused or arouse his passions, is no excuse—if he has mind enough to predetermine the act and know its consequences.

"14. The fact, if proved, that the mother and uncle of

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the defendant were insane, is no evidence of the insanity of the defendant; and without other proof tending to prove that defendant was insane at the time he did the act, it must be disregarded by the jury.

"15. The law does not presume the son insane because the mother was, nor because other relations were; and from such facts alone you can not find insanity in defendant.

"16. The defendant has been permitted to give evidence of his drinking habits before the homicide; yet the evidence will be of no avail, unless you find him insane at the time of committing the homicide, that is, of firing the fatal shot * * .

"22. If the defendant wilfully and with premeditated malice shot Alexander Evans, as charged in the indictment, and inflicted upon said Evans' person a wound, and if said wound was ultimately the cause of said Evans' death, the defendant is guilty of murder in the first degree—if he was not at the time insane within the rules laid down herein * * .

"25. The opinions of medical witnesses are admissible in evidence for the consideration of the jury. The opinions of such witness are not admitted for the purpose of controlling the judgment of the jury, but to be considered for what they are worth in your opinion, when considered with the other evidence in the case.

"26. If you think from all the evidence in the case that you ought to reject the testimony of the medical witnesses, or any of them, you have the right to do so.

"28. If the evidence satisfies you that any medical witness in the case has voluntarily come from the State of Illinois, to testify in behalf of the defendant, with the expectation that his expenses would be paid by defendant or others for him; and if it further satisfies you that the defendant was a stranger to such witness; you may consider these matters in connection with his evidence upon the stand, and all the other evidence in the case, in determining what credit you will give to his evidence; and if you believe from his manner of testifying, and the matter of his

testimony, and from the evidence in the case, that you ought to disregard his evidence, you have the right to do so.

"29. If you find from the evidence that the defendant was not insane at the time of the shooting, but knew right from wrong, and understood the consequences of the act, and had the capacity to predetermine to do the act, and did inflict the wound with premeditated malice, and wilfully, and intentionally, then he is guilty of murder, no matter whether at a prior time he was sane or insane.

"30. If you find that the defendant was of sound mind for thirty-two years next preceeding the act, and has been of sound mind ever since the commission of the act, you may consider this evidence in determining whether he was sane at the time of the shooting.

"32. Mere weakness of mind, when the party knows right from wrong, and knows and intends the effect of his act, will not excuse a homicide; for the law will not weigh degrees of strength of intellect, but only inquire whether the accused knew right from wrong—whether he was capable of wilfully premeditating and maliciously doing the act.

"33. Questions have been asked medical witnesses calling for their opinions upon a hypothetical case, a state of facts supposed by counsel to exist; and opinions have been given to such questions; but because the facts have been supposed to exist by counsel, it is no evidence they do exist; and you are to find what if any of the supposed facts have been established, and if any one is not proved to your satisfaction, then the opinions upon such as are not proved can have no application to the case, and ought, as to them, to be disregarded.

"34. If, after considering all the evidence on the subject of insanity, and facts and opinions of witnesses not of the medical profession, as well as of that profession, you are satisfied (with the rule as to reasonable doubt as given you) that the defendant was not insane at the time of doing the act charged, then the defense of insanity has failed and cannot avail the defendant."

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The following charges were given by the court on its own motion:—

"13. I have already said to you, in charges asked by counsel for the State, that if the defendant committed the act, as charged, and knew what he was doing, and that it was wrong and a violation of law, he is liable under this indictment. While this is the law applicable to the question of sanity generally, it seems that in some cases a broader principle should be applied. The best exposition I can give you upon this subject, perhaps, will be to give you what is said by a standard author. I quote from 1 Bishop Criminal Law:—

'§ 478. Yet the form of the question of insanity for the jury, stated above, is well in cases where it is admitted that the mental disease or imperfection extends only to the intellectual powers, and the party has full control over his own actions. How numerous, comparatively, these cases are, is a matter of science and fact not here to be discussed. But it is both understood in science, and sometimes recognized in the law, though judges are slow to yield on this point, that the mental and physical machine may slip the control of its owner; and so a man may be conscious of what he is doing, and of its criminal character and consequences, while yet he is impelled onward by a power irresistible. In such cases, in the language of Lord DENMAN, "if some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible." And the question for the jury, under such a state of the proofs, should be so framed as to comprehend this view.

'§ 479. Let it be remembered, likewise, that this irresistible impulse is not always general, but sometimes has reference to a particular class of actions, as, for example, in "homicidal insanity." "There is," says GIBSON, C. J., "a *moral* or *homicidal* insanity, consisting of an irresistible inclination to kill, or to commit some other particular offense. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid,

and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance." Even this doctrine, as thus qualifiedly and guardedly stated, is discarded by many judges, as the reader who consults the various cases cited in this chapter will see. This matter, however, is evidently one of evidence, as mentioned in a note to the last section. If really a person is impelled by an unseen power which he cannot resist, no court and jury who believe this fact will hold him guilty of a crime.'

"14. If it has been proved that the mother of defendant was insane, and that insanity in the mother raises a strong presumption that it is transmitted to the offspring, yet it rests upon the defendant to prove that he was insane at the time the act was committed. The facts that the mother was insane, that the twin brother of the mother was also insane, and that a cousin was insane, if proved, would not be sufficient of themselves to show insanity in the defendant, but are facts strongly tending to show hereditary insanity in the family, and proper for you to consider with the other testimony in the case, to aid you in determining whether the defendant was insane or not when the act was committed. But if the proof shows that the defendant's mother became insane after his birth, and her insanity was the result of the loss of two children, and was not in any way the result of a hereditary tendency to insanity, then the insanity of the mother is entitled to no consideration, in determining the question of the defendant's sanity or insanity; and so, if the proof shows that the insanity of defendant's cousin, Hugh Manfred, was the result alone of an injury received on the head from the kick of a horse, and not in any way the result of hereditary insanity, in that event Manfred's insanity can throw no light upon the defendant's insanity."

Before entering upon a critical examination of each spe-

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cial charge to which an exception was reserved, it may be well to remark that an erroneous instruction cannot be corrected by another instruction which may state the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury. The effect of the conflicting instructions can only be to confuse the jury; and as they must follow one or the other, it is impossible to determine whether the influence of the court in such a case has been exerted for good or evil. The defendant is entitled to a plain, accurate, and unquestioned statement of the law from the court. Nothing less than this will satisfy the requirement of the statute. *Clem v. The State*, ante, p. 480.

The sixth instruction given at the request of the State is in such language as by necessary inference affirms the proposition, that if the evidence satisfies the jury of the guilt of the defendant, with such certainty that a prudent man would feel safe in acting upon such conviction in his own important affairs, then, in such case, there would be no reasonable doubt of the defendant's guilt.

Mr. STARKIE states it as the law, that "a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest." Stark. Ev. (Sharswood) 865. This rule is stated in discussing the effect produced on the mind by circumstantial evidence; but it matters nothing by what class of evidence this result is attained. There must be this certainty of conviction before a reasonable doubt can be excluded. And we may add to Mr. STARKIE's definition this qualification, that it must be such a conviction of the truth of the proposition that a prudent man would feel safe to act upon the conviction under circumstances where there was no compulsion resting upon him to act at all. In other words, a prudent man, compelled to do one of two things affecting matters of the utmost moment to himself, might,

and doubtless would, do that thing which a mere preponderance of evidence satisfied him was for the best, and yet such a conviction would fall far short of that required to satisfy the mind of a juror in a criminal case. It must induce such faith in the truth of the facts which the evidence tends to establish that a prudent man might, without distrust, voluntarily act upon their assumed existence, in matters of highest import to himself.

The test stated by the court, that the conviction must be such as would induce one to act in regard to his own "important affairs," is too narrow. It must be such a certainty as would justify to the mind action, not only in matters of importance, but in those of the highest import, involving the dearest interests. Nothing short of this can serve as an example of that moral certainty which should alone authorize a verdict of guilty. Moral certainty, says Mr. Burrill, "is a state of impression produced by facts, in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it; the conclusion presented being one which cannot, morally speaking, be avoided, consistently with adherence to truth." Burrill Cir. Ev. 199.

This certainty alone excludes all reasonable doubts. One may act in important matters without having reached this degree of rest from doubt; and nothing, therefore, short of the highest personal interests involved should be placed before the juror as a test, when upon his action may depend the life of another. The highest interests of the prisoner being involved in the decision, the juror's supposed action on no matter of mere importance to himself will serve as his guide. Nor would it be proper for the juror to apply the test to matters personal to himself which are only important considered in comparison with his other affairs. One may perhaps lead a life so near on the level that nothing of import disturbs the even tenor of his way. The test must be uniform; and though in a special case the conviction of the defendant may only involve a short imprison-

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ment or fine, still, as the rule may be also applied to cases involving the life of an accused person, the illustration employed should always refer to the highest interest. In this case, from a reference by the judge who tried the cause to the decision of *Arnold v. The State*, 23 Ind. 170, we must suppose that what was there given as a simple illustration of a case where a reasonable doubt would exist has been accepted as a test by which to determine all doubts. The opinion was not intended to be thus understood.

In regard to the second charge, it was plainly erroneous, as it required of the prisoner, if he sought to avail himself of the plea of insanity, that he "must *prove* the fact in his defense." So, also, of the fourteenth charge.

If the evidence introduced by the defendant on this subject created a reasonable doubt in the mind of the jury as to the sanity of the defendant, he should have gone acquit. He was not required to prove his insanity. The legal presumption of sanity simply dispenses with proof on that subject in the first instance on the part of the State. When, however, the defendant's evidence has created a doubt on this point, the burden falls upon the State of proving his sanity. The instruction, indeed, would be erroneous by reason of the error in the sixth charge in regard to the extent of proof required to remove all reasonable doubts.

The ninth charge is objectionable also, for the same reason. It requires the defendant "to prove such a deprivation of the reasoning and mental powers, at the time of the killing, as shows that the defendant did not know the consequences of his act, and that it was a wrong, and that it was illegal." How prove this fact? By a preponderance of evidence? or beyond a reasonable doubt? And again we must turn to the sixth instruction to determine what is such a doubt.

But the instruction is erroneous for another reason. It assumes either that the mind possesses but one faculty, the cognitive, or power to apprehend by the understanding, or that this faculty alone is liable to disease which may

relieve the sufferer from responsibility. Neither hypothesis is true. The scientific world, both of the metaphysical and physiological schools of mental philosophers, have accepted the division of powers announced by Kant—the cognitive, or comprehending power; the feelings, or capacities for pain or pleasure; and the conative, or will power; without which latter there is nothing upon which to rest the doctrine of free agency and moral and legal responsibility to the law for an act done or omitted.

That disease may successfully assail this triune organization is not denied; and that its assaults are limited to the understanding can no longer be contended in the light of experience, which exhibits the victims of a lost will in every insane hospital in the civilized world. Man, under the influence of disease, may know the right, and yet be powerless to resist the wrong. The well known exhibitions of cunning by persons admitted to be insane, in the perpetration of an illegal act, would seem to indicate comprehension of its evil nature and legal consequences, and yet the power of self-control being lost from disease, there can be no legal responsibility. Repeated instances are given where persons subject to temporary paroxysms of insanity have, during a lucid interval and when under apprehension of a renewed attack, besought their friends to restrain them by force, that they might not yield to some uncontrollable impulse to do wrong.

A charge, therefore, which limits the inquiry of the jury to the condition of the cognitive faculty is erroneous, because mental disease may as well involve the will as the understanding. That it does also often extend to the affections is equally well established; and perhaps no peculiarity of the insane is more marked than the unreasonable aversion exhibited by them toward those who in health occupied the citadel of their affections. This species of insanity, which would in law avoid the disposition of a man's property by will, of which repeated instances are given in the books, acts directly upon the will and often assumes com-

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plete control over that power; and when this result is reached, moral and legal responsibility are at an end.

In determining the sanity or insanity of a testator, undue influence, prejudice, or a morbid affection which controls his will, are well known tests. That degree of influence, either external or internal, which deprives the testator of his free agency avoids the will. "Hence, anything in the character of the will which renders it contrary to natural affection, or what the civil law writers denominate an undutiful testament, as where children, or others, entitled to the estate, in case of intestacy, are wholly disinherited, or if not wholly deprived of a share, it is given in such unequal portions as to indicate that it is done without any just cause, and wholly dependent upon caprice, or over persuasion, or deception, it must always excite apprehension of undue influence, at the very least." Redf. Wills, 521. "So where the will is unreasonable in its provisions, and inconsistent with the duties of the testator, with reference to his property and family, this will impose upon those claiming under the instrument the necessity of showing that its character is not the offspring of mental defect, obliquity, or perversion." *Id.* 515.

This is a full recognition of the position, that the power of volition may be so far impaired by disease that it may be under the control of the perverted affections; and in such a case the act of the testator is declared not his voluntary deed. Why should the influence of disease upon this power of the mind be recognized by the courts in civil cases and denied when applied to criminal cases? If in the one case the act be declared involuntary because the will is so prostrated by disease as to render it incapable of following the understanding, why should the law exact a criminal responsibility under the same conditions? No one would insist upon limiting the test in the contest of a will to the question whether the testator knew the act he was doing was right or wrong; and yet under this test, enforced in criminal cases alone, a man might be executed for

a homicide whose testament would be avoided⁴ on the ground of his insanity.

The doctrine that insanity may affect not only the understanding, but control also the power of volition, was fairly recognized by Chief Justice SHAW, in the case of *Commonwealth v. Rogers*, 7 Met. 500; although an apparent reluctance to be the first to announce a doctrine then regarded as radical has rendered the entire opinion more unsatisfactory and confused than any other pronounced by that learned judge and distinguished jurist. This was again declared by Judge BREWSTER, in *Commonwealth v. Haskell*, 4 Am. Law Rev. 240; by Chief Justice PERLEY, in *State v. Pike*, *Id*; and by this court, in the case of *Stevens v. The State*, *ante*, p. 485.

We will not attempt to discuss the different announced classifications of insanity—with them we have nothing to do. Their technical names and nice theoretical distinctions have long enough confused courts and cast contempt upon the verdict of juries. Insanity is a disease. The effect it has produced upon the faculties of the reason and will are all we are concerned with. It is no more the province of a court to instruct a jury as to the effect this disease will produce in a special subject, than as to the result of an attack of cholera or fever. The effect which has been produced is a question of fact, and to be proved in like manner. Insanity must be recognized as a disease which may impair or totally destroy either the understanding or the will, or indeed both; and all symptoms of such disease and its effect upon these faculties should go to the jury, and, as a matter of fact, they must determine the mental condition of the defendant. We are well aware that the doctrine of insanity has been the shield employed by counsel to cover the most execrable crimes, and that juries have disgraced themselves and degraded their office in applying it to the sanest of criminals. In special cases they will not distinguish between insanity and moral depravity. If there ever were a time when the truth might be withheld, the tempt-

ation would be strong upon us now. But there is no such time in the history of courts. It is our duty to declare the law as we understand it, fully and plainly, and any responsibility for its misapplication must rest upon those who abuse a plain truth. We are satisfied that it is always safer that the law should be well understood, than that it should seem clothed in mystery.

Indeed, it must be evident that the cases where the shield of insanity protects the guilty, are those alone where the circumstances attending the act appeal so strongly to the sympathy of the jury that they would acquit without even a pretext; where the feelings control the judgment and the moral obligation of their oath, and fit the triers, if not the tried, for an inquest of insanity.

The tenth, eleventh, twenty-ninth, and thirty-second instructions are objectionable, also, as limiting the question of insanity to the understanding.

The instructions in regard to intoxication are correct in the abstract, and cannot be criticized in the absence of more special instructions presented by the defendant, with the exception of the thirteenth charge, which limits the question of insanity to the understanding. Nor do we see any valid objection to the charge in regard to hereditary insanity.

The thirteenth charge given by the court on its own motion contains an extract from Bishop's Criminal Law, which we will not review, except to remark that the requirement of GIBSON, C. J., therein contained, that homicidal mania, to be recognized, must be habitual, would find very few cases where it could be favorably applied. Before the defense could be available, the victim of the mania would doubtless have been confined for life, or executed, in the effort to acquire the habit. The entire sections quoted were not proper for the consideration of a jury. The law that goes to the jury from the court should be given as law, unquestioned by the opinions of other judges.

In regard to the twenty-eighth charge, wherein the court

casts discredit upon a medical witness because he may have attended the trial from an adjoining state with the expectation that his expenses would be paid, it must receive our unqualified disapprobation. The motive prompting him may have been, and doubtless was, one in the interest of humanity and science, and merited no implied censure from the court, a *forum* where truth should be sought from all sources.

The twenty-second charge is also objectionable, as resting upon the sixth charge.

The fourth charge contains the same extract from Greenleaf on Evidence that was declared erroneous in the case of *Clem v. The State*, *ante*, p. 480.

There is also a point made upon the introduction of evidence, but as this forms only a reason for the granting of a new trial, and the question may not be again presented, we will not extend this opinion to examine the ruling of the court thereon.

We desire to acknowledge our obligation to counsel for the labor and learning displayed in the preparation of the argument for the appellant.

Judgment reversed, and the cause remanded for a new trial.

ELLIOTT, J., without assenting to all the reasoning in the foregoing opinion, concurs in the decisions on the points ruled.

J. W. Gordon, W. W. O'Brien, S. Carter, H. A. Downey, and J. A. Works, for appellant.

D. E. Williamson, Attorney General, for the State.

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HOMICIDE.—*Malice*.—*Purpose to Kill*.—*Manslaughter*.—Although a person unlawfully and *purposely* kill a human being, yet if it be done in a sudden

31	511
126	669
31	511
140	308
141	26
31	511
147	23
31	511
153	564
31	511
180	684

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heat of passion, caused by a sufficient provocation, and in the absence of express malice, then malice will not be implied from the act, but the offense will be manslaughter.

SAME.—*Provocation by Words.*—Words only, however abusive and insulting they may be, cannot constitute such sufficient provocation to rebut the presumption of malice arising from the act, in such a case, and reduce the offense from murder to manslaughter.

SAME.—*Deadly Weapon.*—If the act be perpetrated with a deadly weapon, so used as likely to produce death, the purpose to kill may be inferred from the act.

SAME.—*Words.*—*Definition of.*—*Statute Construed.*—The word "voluntarily" in our statutory definition of manslaughter means, by the free exercise of the will, done by design, purposely.

SAME.—*Instruction to Jury.*—On the trial of an indictment for assault and battery with intent to murder, the court instructed the jury, in effect, that there can be no *purpose to kill* in manslaughter; and that if such a purpose be shown to exist, and if death result, the killing is murder.

Held, that this was error.

APPEAL from the Wayne Criminal Circuit Court.

ELLIOTT, J.—Murphy was tried and convicted on an indictment for an assault and battery, with intent to murder Isaac Parks, and sentenced to pay a fine of one dollar, and be imprisoned in the state prison for the term of two years.

A new trial was prayed and overruled, and that ruling is assigned for error.

Error of the court in certain instructions given to the jury, and the refusal to give, as requested, certain other instructions asked for by the defendant, are among the reasons urged for a new trial.

It was claimed on the part of the defense, that the assault and battery charged in the indictment was committed in a sudden heat of passion and without malice; and hence the defendant was not guilty of the felonious intent to murder, as alleged.

On this point, the court, after reading to the jury the statutory definition of manslaughter, further instructed them as follows: "In this offense there is no malice, either express or implied; there is no deliberation or *purpose to kill*, but a killing voluntarily, upon a sudden heat, or involuntarily, in the commission of some unlawful act; and if the jury be

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lieve from the evidence that, if death had resulted to Parks, it would, under the circumstances, have been manslaughter, then the jury must find the defendant not guilty of the intent charged in the indictment."

The court also refused to give certain instructions as asked by the defendant on the same subject, but gave them with this qualification: "If the parties, Parks and defendant, were engaged in a fight, and during that conflict the blows were inflicted on the body of Parks in the heat of blood, without malice, premeditation, or purpose to kill, it would be manslaughter; but in considering the whole case the jury may take into consideration the fact, if proved, whether the defendant did or did not use a deadly or dangerous weapon in inflicting the wounds, and how far the use of such deadly or dangerous weapon may establish malice, as all men are presumed to intend the reasonable and natural consequences of their acts." By these instructions the jury were told, in effect, that there could be no purpose to kill in manslaughter, and that if such a purpose were shown to exist, the killing would be murder. This, we think, is not a correct exposition of the law. The killing may be unlawful, and purposely done, and yet if it is done without malice, in a sudden heat and transport of passion, caused by a sufficient provocation, it is only manslaughter. It was so held in *Dennison v. The State*, 13 Ind. 510. It is also apparent from the definition of manslaughter given in the statute, viz.: "If any person shall unlawfully kill any human being without malice express or implied either *voluntarily* upon a sudden heat, or involuntarily, but in the commission of some unlawful act, such person shall be deemed guilty of manslaughter," &c. "Voluntarily" means, by the free exercise of the will, done by design, purposely.

To constitute murder in the second degree, the killing must be unlawful—that is, without justification or legal excuse—and it must be done purposely and maliciously.

Malice may be proved by direct evidence, such as seeking:

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an opportunity to perpetrate the act by lying in wait, prior threats, &c. This is denominated express malice, and such proof would be evidence of premeditation, and would make the offense murder in the first degree. Malice may also be implied from the act of killing; as, if the killing is done purposely, without justification, legal excuse, or reasonable provocation, malice is implied from the act. And if the act is perpetrated with a deadly weapon, so used as likely to produce death, the purpose to kill may be inferred from the act; because it is but reasonable to infer that a party intends to do what his wilful act is palpably calculated to effect.

But although the killing may be unlawful, and done purposely, yet if it is done in a sudden heat of passion, caused by a sufficient provocation, and in the absence of express malice, malice is not implied from the act, and the offense is manslaughter. But it should be remembered that words only—however abusive and insulting they may be—cannot constitute a sufficient provocation to rebut the presumption of malice arising from the act, and reduce the offense from murder to manslaughter.

The court erred, for the reason stated above, in overruling the motion for a new trial.

Judgment reversed, and the cause remanded for a new trial.

W. A. Peelle, J. H. Popp, and H. C. Fox, for appellant.
D. E. Williamson, Attorney General, for the State.

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CRIMINAL LAW.—*False Pretenses.—Statute Construed.*—The statute 2 G. & H. 445, sec. 27, does not require, as an element of the offense thereby defined, that the false representation should be made for the purpose of accomplish-

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 31 514
 149 343

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ing the particular thing which does result. A false pretense such as would tend to produce the result accomplished, an obtaining thereby, and designedly, a thing of value from another, and an intention by the transaction to defraud that other, are the only elements of the offense.

SAME.—Indictment.—If a particular result is designed to be accomplished by making the false pretense, which however fails, and another thing of value is obtained and accepted with like intent to defraud, the law imputes to the person making the false pretense a design from the beginning to consummate the latter result; and under our criminal code, this conclusion of law from the facts need not be alleged in the indictment, if the facts are alleged from which it inevitably results.

SAME.—Indictment against T. for obtaining money and a signature as surety by false pretenses, charging that the defendant "on, &c., at, &c., feloniously, designedly, and with intent to defraud one G., did falsely pretend to said G. that he, said T., was then and there the owner of a certain house and lot in a town named, in an adjoining state named, of great value, to wit, twenty-six hundred dollars, and a certain harness-shop, in another town named, in said adjoining state named, of great value, to wit, six hundred and fifty dollars; by means of which false pretenses, the said G. relying upon and believing the same to be true, said T. did then and there feloniously obtain from said G., on his, said T.'s sole and individual credit, the sum of four hundred dollars, lawful money, as a loan for nine months, and the signature of said G., &c., &c., with intent then and there to defraud said G.; whereas, in truth, said T. was not then and there the owner," &c., &c.

Held, that the indictment was not double.

Held, also, that though it was not alleged expressly that in making the representations the defendant's intention was to accomplish the particular result which was in fact obtained—though the indictment was not so certain as to exclude the conclusion that the defendant may have designed to accomplish his fraudulent purpose in another mode—yet it sufficiently showed a connection between the false representations made and the result produced.

SAME.—Evidence.—It was not necessary to prove all the pretenses charged in the indictment.

SAME.—Similar Representations to Others.—The State was allowed, over defendant's objection, to put in evidence representations of the defendant similar to those charged in the indictment, made to other persons than G., not in the presence of G., and not at the time the representations were made to G.

Held, that this was error.

SAME.—Hearsay.—The false representations appeared to have been made and the money and signature obtained in January, at which time defendant referred G. to one B., for information as to the ownership and character of the house and lot of which the defendant represented himself as the owner; and the State put in evidence the declaration of B., made in the following November, that the defendant did not own any house and lot in said town.

Held, that this declaration was not admissible in evidence.

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SAME.—Representations of Value.—Variance.—It was proved that the defendant represented the house and lot to G. as worth \$2,200 or \$2,300, instead of the sum laid in the indictment.

Held, that this was a fatal variance.

APPEAL from the Elkhart Circuit Court.

FRAZER, C. J.—This was an indictment for obtaining money and a signature as surety by false pretenses. The charge was that the defendant, “on, &c., at &c., feloniously, designedly, and with intent to defraud one Grimes, did falsely pretend to said Grimes, that he, said Todd, was then and there the owner of a certain house and lot in Ashland, Ohio, of great value, to wit, twenty-six hundred dollars, and of a certain harness-shop in Leesburg, Ohio, of great value, to wit, six hundred and fifty dollars; by means of which false pretenses (the said Grimes relying upon and believing the same to be true) said Todd did then and there feloniously obtain from said Grimes, on his, said Todd’s sole and individual credit, the sum of four hundred dollars, lawful money, as a loan for nine months, and the signature of said Grimes, &c., &c., with intent then and there to cheat and defraud said Grimes; whereas, in truth, said Todd was not then and there the owner,” &c., &c.

The action of the court below in overruling a motion to quash the indictment presents a question for our decision.

It is argued that the indictment is double. We do not so understand it. As we read it, but a single transaction is charged, and therefore but one offense, though consisting of several parts.

But it is also objected, that the indictment does not sufficiently show a connection between the false representations made and the result produced, inasmuch as it is not averred that the representations were made with the intent of obtaining credit with the prosecuting witness—that it is consistent with the averments that the purpose of the prisoner was to sell the property, and not to obtain the loan or the signature—and hence, that it does not appear that in making the representations the design was to accomplish the

particular result which was in fact obtained. This point requires close consideration, and a careful attention to the language of the indictment.

It will be noticed that the result is alleged to have been accomplished by the representations, and at the time that they were made, and not at a subsequent time; and that the representations were made and the money and signature obtained with intent by the defendant to cheat and defraud Grimes. We have, then, these elements: false pretenses calculated to create confidence in solvency, by which money was obtained as a loan, &c., with intent to defraud. But it is not alleged expressly that it was the defendant's intention in making the representations to defraud in the particular method stated, that is, by obtaining a loan. The indictment is not so certain as to exclude the conclusion that he may have designed to accomplish his fraudulent purpose in another mode, as by a sale of the property which he pretended to own.

The reports abound with cases where indictments like this one in the particular alluded to have passed without challenge, and convictions have been had upon them. Cases are numerous, too, where such indictments have been held good; and the books of precedents are full of forms substantially similar to the indictment in this case. See Wharton's Precedents, 528, 575, and notes.

The appellant however relies on *Commonwealth v. Strain*, 10 Met. 521. In that case, it was charged in the indictment, that the defendant, designedly and knowingly, falsely pretended to C. D. that a watch which he then and there had was a gold watch; by means whereof he designedly obtained from C. D. a sum of money specified, with intent, &c. It was not averred that the money was obtained as a loan, as in the case before us. The transaction was not so definitely described. The fact in evidence was, that the money was obtained upon a sale of the watch. And it was held, that the fact should have been averred—that the nature of the offense should be so specifically stated that the defendant

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may be able advisedly to prepare for trial; and it was said, "that (in such a case) the false pretenses should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be." It was admitted that the precise question on which that case turned was new, and that there were precedents both ways. There was also a somewhat similar ruling in a like case in this court, in *Johnson v. The State*, 11 Ind. 481, upon the authority of Lewis' U. S. Crim. Law, 674.

We have no disposition to question the correctness of the judgment in either of those cases. But we do not think they can be properly applied to the case now in hand. It is well settled, that the false representations, to make the crime, must appear to be such as would tend to produce the result accomplished. This did not appear by the allegations in either of the cases mentioned. The statement that a watch was gold, as in the Massachusetts case, and that checks to the amount of seventeen dollars were good and of par value, as in 11 Ind. *supra*, were not, alone, if fully credited, likely to procure from a bearer, either money or a set of harness, as a gift, though desired; and this was the substance of what was alleged in those cases. But a statement that one owns real estate worth over three thousand dollars, would, if believed, reasonably establish a credit to the extent of a few hundred dollars, and would tend to procure such a loan. We cannot agree that such a statement made for the purpose of defrauding generally, as is charged, would not be the offense defined by the statute, if a loan of money was thereby obtained and accepted, with a purpose to defraud the lender, even though it should turn out that really not a loan, but a larger swindle, by a sale of the property, was contemplated. The statute does not require, as an element of the offense, that the false representation should be made for the purpose of accomplishing the particular thing which does result. A false pretense; an obtaining thereby, and designedly, a thing of value from another;

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and an intention by the transaction to defraud that other; these are the only elements of the offense. 2 G. & H. 445, sec. 27. If a particular result is designed to be fraudulently accomplished by making the false pretense, which however fails, and another thing of value is obtained and accepted with like intent to defraud, the law will irresistibly impute to the defendant a design from the beginning to consummate the latter. This is a conclusion of law from the facts, and, under our criminal code, need not be alleged, if the facts are alleged from which it inevitably results. In this case we have it averred, that certain false representations, known by the defendant to be such, were made by him to Grimes, with intent to defraud Grimes; that G. believed and relied upon them; and that the defendant thereby obtained the money, &c., from G., with intent to defraud him. The statements were calculated in their nature, if believed, to inspire confidence in the ability of the defendant to pay. It is not, in terms, alleged that he "designedly obtained" the money, &c.; nor do we think this necessary. It is conclusively implied from the allegations made—or rather, the same thing is averred in other language. To obtain the money with intent to defraud, is *designedly* to obtain it.

On the trial, the State was allowed, over the defendant's objection, to put in evidence representations of the defendant, similar to those charged in the indictment, made to other persons than Grimes, not in his presence, and not at the time the representations were made to him; and also to put in evidence the declarations of one Bechtel, made in November, 1868, that the defendant did not own any house and lot in Ashland. The false representations appeared to have been made in January, 1868, at which time the defendant referred Grimes to Bechtel for information as to the ownership and character of the Ashland property.

We do not think that these items of evidence were admissible. That false representations were made to one does not tend to prove that similar statements were, at a different time and place, made to another. To prove a prisoner

guilty of a particular crime, it is not admissible to show that on another occasion and at another place he committed, or attempted to commit, a similar crime; for the reason that the two facts bear no certain or probable relation to each other, but are wholly disconnected. Such evidence may create a bad opinion of the general integrity of the accused, and thus incline the mind of the jury to a readiness to believe him guilty as charged in the cause on trial. But this the law will not allow. The State is not at liberty, even by the usual modes of showing character, to attack the accused in that particular, unless he first invites it by evidence upon the subject.

So, as to the statements of Bechtel. This was purely hearsay, and not, as seems to us, an exception to the general rule which excludes hearsay as evidence. We are aware that where one in dealing with another refers to a third person for information, and the third person, being applied to, makes statements upon the faith of which the party acts, such statements are sometimes admissible in evidence, the same as if the statements had been made by the person who gave the reference. Sometimes, indeed, there is a just *estoppel* which forbids him to dispute the truth of the information thus given. But where the person referred to has not been consulted until long after the business has been consummated, and has made no statements upon the faith of which any one has acted, and a question arises, long subsequently, as to what was the real truth of the matter, we know of no reason and no authority for the position that his statements then made, not under oath, shall be admitted as proof of the facts. Such a doctrine would be full of danger; would in criminal cases subject the accused to the peril of conviction upon statements made for the purpose, without the sanction of an oath or the tests of a cross-examination; and would not find support even in the unsatisfactory plea of necessity.

It was not necessary to prove all the pretenses charged

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in the indictment. *Rex v. Ady*, 7 C. & P. 140; *Commonwealth v. Morrill*, 8 Cush. 571; *State v. Mills*, 17 Me. 211.

The proof of the representation of the value of the property did not agree with the averment of the indictment as to amount. Instead of the Ashland house and lot having been stated by the prisoner to be worth \$2,600, he stated that it was worth \$2,200 or \$2,300. In *The People v. Herick*, 13 Wend. 87, a similar variance was held to be immaterial, in a case very much like this. But in *Commonwealth v. Davidson*, 1 Cush. 33, there was a contrary decision upon the question. So, also, in *O'Connor v. The State*, 30 Ala. 9, and *Rex v. Plestow*, 1 Campb. 494. In the last case, Lord ELLENBOROUGH said, "In an indictment for false pretenses, the pretenses must be distinctly set out, and at the trial they must be proved as laid." So, also, the rule is stated in 2 Russ. Crimes, 310. Sums of money, dates, &c., need not usually be averred with accuracy, but when, as in this case, they constitute a part of the description of the offense, they stand on a like footing with other matters of description, and must be proved as laid. It is believed that the New York case is not supported by any authority whatever.

Reversed, and remanded for new trial. Prisoner to be returned, &c.

W. A. Woods, J. D. Arnold, A. S. Blake, and R. M. Johnson, for appellant.

D. E. Williamson, Attorney General, for the State.

Since *Morgan v. The State*, ante, p. 193, was stereotyped, the case of *Regina v. Jenkins*, Law Rep. 1 C. C. R. 191, has been published. BYLES, J., there says, "Dying declarations ought to be admitted with scrupulous, and I had almost said with superstitious, care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subjected to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions, and of unintentional misrepresentations, both by the declarant and the witness, as this case shows. In order to make a dying declaration admissible, there must be an expectation of impending and almost immediate death, from the causes then operating. The authorities show that there must be *no hope whatever*. In this case the deceased said originally she had no hope at present. The clerk put down that she had no hope. She said in effect when the statement was read over to her, 'No, that is not what I said, nor what I mean. I mean that *at present* I have no hope;' which is, or may be, as if she had said, 'If I do not get better I shall die.'"

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from the residence of one A., who was treasurer of a treasonable organization, the object of which was the protection of deserters, and who had been fined in the United States Court upon a plea of guilty to an indictment for harboring deserters. Upon the fire being returned, the assailants fled, and the soldiers, after proceeding a short distance, about three or four o'clock in the morning and before daylight, discovered A. crossing the road from the direction in which the firing had occurred, and halted and searched him, finding nothing but a part of a box of caps, though he subsequently stated that he dropped a revolver when he stopped. He seemed fatigued, and was "puffing and blowing." He was thereupon arrested and secured with ropes by the soldiers under command of said sergeant, and taken by them beyond the county, to the military headquarters of the district, where he was discharged by the provost marshal, after a short detention. Suit by A. for damages, against said sergeant and those under his command.

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- any and all proceedings for seduction arising out of, or in any way connected with, said case of bastardy.
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8. *Practice.—Parties.*—Written agreement, as follows: "Whereas there is an action now pending in the Bartholomew Common Pleas Court wherein A. is plaintiff and the undersigned and others are defendants, wherein said A. sues for money expended by said A. at their request in obtaining recruits under a call made by the President of the United States; and whereas the undersigned are desirous of compromising said cause and paying to said A. whatever sum may be found due him; and whereas B., C., and D. are trying to compromise said cause and ascertain the sum due to A., in order to pay the same to him; now, therefore, we, the undersigned, agree to and with said B., C., and D. that if they should compromise said cause and ascertain the amount due to said A., upon any compromise they may make, to pay to said parties or to said A. the proportional interest due from each of the undersigned as the ascertained amount due to said A.; and should said B., C., and D. agree upon the amount due to said A. and pay the same to him, or in any way satisfy the same, each of the undersigned promise and agree to pay to him the proportional amount due from them, and severally promise to pay their several proportions of said amount that may have been so paid to said A., without relief from valuation or appraisement laws, and agree to indemnify them against all loss or damage in any way in making said compromise; and said B., C., and D., are left to compromise said cause in such manner as they may think best." Suit on this agreement against the signers thereof by B., C., and D., alleging a compromise by them with A. by giving him their note for a certain sum which B. had paid with his own funds, &c. *Held*, that the defendants were properly joined in the same action. *Coy et al. v. Stucker et al.*.....161
9. *Release.*—The fact that defendant E. paid a certain portion of a judgment against the plaintiffs on said note, and defendants E. and F. became replevin bail on such judgment, upon the agreement of D. to release E. and F. from liability upon the contract in suit, was a good defense as to E. and F., but not available as to the other defendants..*Ibid.*
10. *Same.*—The release by the plaintiffs of any one originally liable in the action pending when the written contract was made, but not a party to such contract, could not avail as a defense to this action.....*Ibid.*

11. *Parol Evidence.—Contradiction of Written Contract.*—It could not be set up in defense to such suit on said agreement that there were other parties defendants in said action by A. than those who signed the agreement, and that plaintiffs agreed to get all said defendants to sign it, and failing to do so the agreement was to be void, and that it was upon that express condition it was delivered to plaintiffs.....*Ibid.*
12. *Pleading.—Partial Defense.*—Answers by certain of the defendants alleging that the indebtedness, to compromise which the contract in suit was executed, was one in which the plaintiffs were equally involved with the defendants, and pleading certain payments made by these defendants, and asking that they might be considered in fixing the final liability.
Held, that the answers were good to the extent and purpose for which they were pleaded.....*Ibid.*
13. *Compromise.—Doubtful Question of Law.*—Answer by one of the defendants that there was a doubtful question of law as to his liability under the contract in suit, and that a compromise was therefore made and a less sum given in discharge of a greater liability.
Held, that the answer was bad...*Ibid.*
14. *Carrier.—Collections.—Bill of Lading.*—A bill of lading recited, that the goods were "to be delivered without delay, &c., at the port of, &c., to, &c., or assigns, he or they paying freight for said goods at the rate of, &c.; charges payable when collected by boat; charges to be collected" a certain sum, being the value of the goods.
Held, that if the carrier delivered the goods without collecting such charges, he was liable therefor to the person who so contracted with him and delivered the goods to him.
Meyer v. Lemcke et al......208
15. *Liquidated Damages.*—Where a party covenants for the abstaining from doing, or for the performance of, some particular act or acts which are not measurable by any exact pecuniary standard, and it is agreed that the party so covenanting shall pay a stipulated sum for a violation of any of such covenants, that sum is to be deemed liquidated damages, and not a penalty. *Studabaker et al. v. White*.....211
16. *Same.—Bond.—Restraint of Trade.—Liquor Traffic.*—Bond for \$1,000, conditioned that the obligor should sell no more spirituous or malt liquors or wine, within a county named, after a specified date, or cause the same to be sold within said county, either directly or indirectly, after the time specified, or manufacture or obtain any spirituous or malt liquors or wine, or cause to be sold, in said county, by himself or any other person, either directly or indirectly, after said date; that he should settle a certain obligation calling for liquors, payable to a third person named, of a certain sum mentioned so that the liquors should not be brought to a town named, in said county; and should use his influence to prevent any person or persons from bringing any of the aforesaid liquors to said town with the intention of selling the same within the town.
Held, that such a bond is valid in this State.
Held, also, that said sum of \$1,000 was liquidated damages, and not a penalty.
Held, also, that the failure of the obligor to deliver any liquor in fulfillment of his contract with such third person, would not have been a breach of the condition of the bond.....*Ibid.*
17. *Party-Wall.*—A. purchased of B. a portion of a certain lot, a part of the consideration, as shown by a written agreement between said parties, being, that A. promised to build thereon, within a short time, a first class three-story brick building; and it was agreed that one of the walls of the building should be a party-wall, each owning one moiety thereof and giving an equal amount of the ground; and that "whenever B. or his heirs or assigns use said wall by erecting a building on the lot adjoining on the said A.'s, B. or his heirs or assigns putting the joists of their building in said wall, then said A. or his heirs or assigns is to receive one-half of the actual cost of the building of said wall from B. or his heirs or assigns." A. complied with

his contract by erecting a three-story brick building, leaving joist-holes. B. erected a two-story brick building capable of lasting many years, using the party-wall as one of the walls of his building, but did not insert his joists therein.

Held, in a suit by A. against B. upon the written agreement, to recover one half the cost of the party-wall, that the use of the wall was the thing contracted for, and that putting the joists into it was only an incident. *Greenwald v. Kappes*. 216

18. *Breach of.—Measure of Damages.* Where a person contracts to do a certain amount of work, at a stipulated price, upon materials to be furnished by his employer within a specified time, and is ready and willing to perform, but is prevented by the failure of the employer to furnish materials as promised, he is entitled to merely compensatory damages; and where during such time he is offered other employment of the same kind, he is not entitled to the whole amount of profits he would have made if the contract had been fully performed by both parties. *Heavilon et al. v. Kramer*.....241

19. *Joint Debtors.—Release.*—A. held a judgment against B. and C. for a certain amount; B. paid half the amount, and thereupon A. executed to him a written instrument wherein A. covenanted that he would thenceforth "pursue the legal and equitable remedy on said judgment against C. alone, and not against B., looking to C. alone for the full and final payment and satisfaction of said judgment, without, however, intending to prejudice or interfere with the rights and liabilities of said B. and C. to each other on account of said judgment."

Held, that this instrument did not operate as a release of C. from liability upon the judgment. *Aylsworth et al. v. Brown et al.*.....270

20. *Implied Assumpsit.*—Suit on a promissory note. Answer, that in purchasing a saw-mill of the plaintiff the defendant agreed to pay off for the plaintiff and deliver to him a certain promissory note described, made by the plaintiff and payable to a third person named; that the

defendant was induced so to agree upon the plaintiff's representation that said note to said third person did not bear interest until maturity, upon the truth of which the defendant relied; that said note did, in fact, bear interest from its date, which the plaintiff well knew; that such interest at the maturity of the note amounted to a sum specified, which the defendant paid, together with the principal, which sum so paid as interest he asked to set off.

Held, that the answer was good on demurrer. *Brown v. Freed*.....387

CONTRACTOR.

See RAILROAD, 14, 15.

CONTRIBUTION.

See PRINCIPAL AND SURETY, 7.

CONVERSION.

See ATTORNEY.

CONVEYANCE.

See DESCENT, 6; VOLUNTARY CONVEYANCE, 1, 2, 3.

To husband and wife. See HUSBAND AND WIFE, 1, 2.

CORPORATION.

See CITY; RAILROAD; TOWN.

1. *Promissory Note.—Party Plaintiff.*—A note made payable to the treasurer of what purports to be a corporation, without giving the name of the treasurer, is, in effect, payable to the corporation, and shows that the corporation is the party in interest; and a suit on the note is properly brought in the name of the corporation. *McBroom v. The Corporation of Lebanon*.....268
2. *Estoppel.*—It is well settled in this State, that where one contracts with what purports to be a corporation, he is estopped from denying the existence of the corporation at the date of the contract.....*Ibid*.
3. *Judicial Notice.*—This court does not judicially know that there is not, or cannot be, a corporation by the

- name of the "Corporation of Lebanon," under the laws of this State..... *Ibid.*
4. *Statute.—Pleading.—Evidence.*—Where a statute of another State constitutes a part of the organization of a corporation suing in this State, it is not necessary to its introduction in evidence by the plaintiff that it should have been pleaded. *Paine et al. v. The Lake Erie & Louisville R. R. Co.*.....283

COSTS.

See NEW TRIAL, 1, 2.

Pleading.—Answer.—In a suit to enforce the entering of satisfaction of a mortgage, a party defendant against whom no relief is sought, but who is made a defendant merely to answer as to his pretended interest in the subject matter of the suit, must file an affirmative answer if relief is sought by him. The general denial by such a party puts the plaintiff to such proof as will place such defendant in the wrong. He may save himself from costs by disclaiming any interest. *Paine et al. v. The Lake Erie & Louisville R. R. Co.*.....283

COUNTER-CLAIM.

See JURISDICTION, 12, 13.

COUNTY AUDITOR.

See OFFICE AND OFFICER, 3, 4, 5.

COUNTY CLERK.

See FEES; OFFICE AND OFFICER, 1, 2.

COUNTY COMMISSIONERS.

See BOARD OF COUNTY COMMISSIONERS.

COURT OF COMMON PLEAS.

1. *Jurisdiction.—Title to Real Estate.*—Where the main object of a complaint in the court of common pleas is to have satisfaction entered of a mortgage of real estate, there is no error in overruling a motion made by the defendant before answer to transfer the cause to the circuit court on the ground that the title to

real estate is in issue. *Paine et al. v. The Lake Erie & Louisville R. R. Co.*.....283

2. *Alteration of Districts.—Vacancy. Election.—Statutes Construed.*—By act of 1859 (2 G. & H. 20, sec. 3), the counties of Tippecanoe, Benton, White, and Carroll, were made a common pleas district, in which it was required that a judge should be elected on the second Tuesday of October, 1860, and every fourth year thereafter. By act of 1861 (2 G. & H. 653), this district was required to be designated and known as the fifteenth district. By act of 1867 (Acts 1867, p. 92), the twenty-third district was created, consisting of the counties of Tippecanoe and Warren, and it was enacted that the then elected judge of the fifteenth district should be, and perform the duties of, judge of the twenty-third district, until the expiration of his term of office.

Held, that by said act of 1867, the remaining counties, White, Benton, and Carroll, did not cease to be the fifteenth district, but a vacancy was thereby created on its bench, to be filled by appointment by the Governor till the general election of 1867, then by election for the unexpired term, till October, 1868, when a judge of that district was required to be elected. *Reed v. Baker, Governor*.....425

COVERTURE.

See HUSBAND AND WIFE.

CRIMINAL LAW.

See FEES; WITNESS, 2.

1. *Information.—Arrest of Judgment.*—An information which is so uncertain that upon a plea of guilty the court cannot know what punishment it may affix, is bad on motion in arrest of judgment. *Vogel v. The State*61
2. *Same.—Sunday.—Liquor Law.*—Information charging, that "A., at, &c., being over four fourteen years of age, on, &c., that being the first day of the week, commonly called Sunday, was found unlawfully at common labor and engaged in his usual avocation, to wit, selling and

- dealing out to B. two gills of whiskey, and receiving therefor twenty cents," &c.
- Held*, that as it did not appear from the information whether or not the defendant had a license, it was bad on motion in arrest based upon the ground that it did not state facts sufficient to constitute a public offense.....*Ibid*.
5. *Justice of the Peace.—Obstructing Highway.—Affidavit.*—Prosecution before a justice of the peace for obstructing a highway. The affidavit charged, "that on or about, &c., at the said county of Jefferson, in the State of Indiana, one A. did unlawfully obstruct a highway then and there situate, being the highway running nearly north and south through section nine, town three, range eight east, from the Scaffold Lick and Kent road to the Lexington and Paris road, in said county and State, by then and there unlawfully erecting fences across said highway, as affiant is informed and believed."
- Held*, that the highway was sufficiently described.
- Held*, also, that it was enough to charge that the obstruction was within the jurisdiction of the court, and not necessary to state the particular place where it was erected on the road.
- Held*, also, that the fact that the charge was made on information and belief did not render the information defective.
- Held*, also, that the mistake of the draftsman in writing "believed," instead of *believes*, was immaterial. *The State v. Buxton*.....67
4. *Indictment.*—Where a statute in a criminal case is not to be taken in the broad meaning of the words used, but to be limited by construction to a special subject or matter, it is proper that an indictment thereunder should not charge the crime in the language of the statute simply, but should limit the case and bring it within the construction placed upon the statute. *Bates v. The State*.....72
5. *Same.—Trespass to Land.*—An indictment, under section 14, 2 G. & H. 462, for removing a quantity of valuable gravel from the land of another, should show the property removed to have been a part of the realty.....*Ibid*.
6. *Construction of Statute.—Words.* The words "remove from" in this section have not a technical meaning authorizing, in such a case, the implying of an averment that the thing removed was a part of the realty.....*Ibid*.
7. *Forgery.—Indictment.*—An indictment for defacing and destroying a promissory note, in which it is alleged, as an excuse for not setting forth the tenor of the note, that it was destroyed by the defendant, must state its substance and effect. *Birdg v. The State*.....83
8. *Same.*—An indictment for defacing and destroying a promissory note must show whether the note was for the payment of money or property.....*Ibid*.
9. *Sunday.—Work of Necessity.*—On the trial of an information for a violation of the Sabbath, under the act of 1855 (2 G. & H. 481), the evidence showed that the defendant was engaged on a certain Sunday in gathering and boiling sugar-water on his premises; that it was a good day for the flowing of the water; that his troughs were full and running over; that he had no way to save the water but by gathering and boiling it.
- Held*, that this was a work of necessity within the statute. *Morris v. The State*.....189
10. *Practice.—Motion in Arrest.*—A variance between the affidavit and the information cannot be taken advantage of by motion in arrest.*Ibid*.
11. *Indictment.—Obtaining Money Under False Pretenses.*—Indictment charging, that "A. and B., on, &c., at, &c., did, feloniously, designedly, and with intent to defraud C., represent and pretend to said C. that a certain bank check and order for the payment of money (here set out *in hæc verba*, purporting to be drawn by D., payable to E., and indorsed by the latter in blank), which the said A. then had in his possession, was good and of the value stated on its face, to wit, eight hundred dollars in currency; by means of which false pretense said A. and B. did then and there obtain from said C. (certain money specified) the goods,

- &c., of said C.; and the said A. and B. then and there delivered said check to said C., to be kept by him as security for the payment of said money by him loaned to said A. and B., which was then and there obtained from said C. as aforesaid by them, with intent to cheat and defraud him; whereas in truth, &c., said check was not good, was not of the value of eight hundred dollars in currency, but was of no value whatever; all of which said A. and B. then and there well knew, &c.
- Held*, that the indictment showed, not merely a false promise, but a false pretense as to an existing fact, and was sufficient. *Maley v. The State*. 192
12. *Change of Venue.—Affidavits.*—In a criminal action the defendant moved for a change of venue on account of local excitement and prejudice, and filed affidavits in support of the motion. Counter affidavits were filed by the State; and thereupon the defendant moved for leave to file additional affidavits in support of the application, which the court refused.
- Held*, that as no additional affidavits were offered by the defendant, no question could be raised in the Supreme Court upon this ruling. *Morgan v. The State*.....193
13. *Same.—Judicial Discretion.—Query*, whether the Supreme Court ought, under any circumstances, to reverse the ruling of a court refusing to grant a change of venue where the affidavit is founded upon excitement or prejudice in the county against the defendant.....*Ibid.*
14. *Juror.—Competency.—Previously Formed Opinion.*—On the examination of persons called as jurors to try an indictment for murder, as to their competency, certain ones of the panel answered, that they had formed opinions as to the guilt or innocence of the defendant, from rumor and newspaper statements on that subject. Upon further examination each of said persons answered, that it would require neither more nor less evidence to satisfy him of the existence or non-existence of the material facts involved in the case by reason of his so already formed opinion. The court thereupon overruled the defendant's challenge "for cause."
- Held*, that this ruling was correct. *Ibid.*
15. *Dying Declarations.—When Admitted.*—Where the statements of a person are offered in evidence as his dying declarations, the proof must clearly show that the declarant was in fact at the very point of death, and that he was fully conscious of that fact, not as a thing of surmise and conjecture or apprehension, but as a fixed and evitable fact.....*Ibid.*
16. *Same.*—It is not required that the deceased should have declared in terms that he expected to die at once, if his condition was such that, of necessity, such an impression must have existed on his mind. On the other hand, no matter how strong the expression of this certainty of death may have been, if there be any evidence of hope in the language or actions of the declarant, his statements will be rejected. *Ibid.*
17. *Information.—Uncertainty.*—An information in which the district attorney charges the offense, "as he verily believes," is bad on motion to quash. *Vannatta v. The State*. 210
18. *Practice.—Supreme Court.—Assignment of Errors.*—In the assignment of errors on an appeal by the defendant in a criminal action, the only errors assigned were, that the finding was contrary to law, and to the evidence given on the trial.
- Held*, that no question was properly presented for the decision of this court. *Cavanaugh v. The State*..229
19. *Liquor Law.—Sunday.*—Section 8 of the act to regulate the license and sale of intoxicating liquors, &c., (1 G. & H. 616) as amended in 1865 (Spec. Sess. 197), prohibits the sale on Sunday of any quantity of intoxicating liquor by a licensed retailer, and is not in conflict with the Constitution of the State. *Schliet v. The State*.....246
20. *Same.—Evidence.*—On the trial of an information under this section, charging, that the defendant was licensed under said act to sell intoxicating liquors in a less quantity than a quart at a time, it appeared in evidence that the defendant, at the time of the sale charged (the fall of 1867), was engaged in the

- sale of intoxicating liquors by the "small," and there were given in evidence two orders of the board of county commissioners, one made at the December term, 1866, and the other at the December term, 1867, granting license to the defendant to sell intoxicating liquors by retail.
- Held*, that this evidence did not show that the defendant was licensed, and was not sufficient to justify a finding against him.....*Ibid*.
21. *Continuance*.—The fact that in a joint prosecution upon information a continuance is granted as to a part of the defendants is no ground for continuance as to another defendant. *White v. The State*.....262
22. *Evidence*.—*Alibi*.—The fabrication of an *alibi*, like the wilful introduction of false and fabricated evidence in support of any other ground of defense, is a circumstance against the accused, to be weighed by the jury in connection with all the other evidence in the case; but where the evidence tending to prove an *alibi* is uncontradicted, and the witnesses are unimpeached, and the facts testified to are reasonable in themselves, the failure of the defendant to account for his whereabouts during all the time within which the offense was probably committed should not be taken as a circumstance tending to prove his guilt.....*Ibid*.
23. *Term of Imprisonment*.—Where a defendant was sentenced to an imprisonment in the county jail for ninety days, and until a fine of one dollar and the costs of the prosecution were paid or replevied;
- Held*, that when the imprisonment for the ninety days had been completed, that portion alone of the sentence was discharged, and there remained the imprisonment for the fine and costs—that the defendant was not entitled to a credit of fifty cents per day upon the fine and costs from the date when his imprisonment commenced. *Ex Parte Tongate*.....370
24. *Evidence*.—*Venue*.—If in a criminal case there be no evidence that the offense charged was committed within the jurisdiction of the court, there should be an acquittal. *Clem v. The State*.....480
25. *Admissions on the Trial*.—*Bill of Exceptions*.—In a criminal case, the court, in its instructions, told the jury, that the defendant had, during the progress of the trial, admitted certain important facts, and that the facts thus admitted must be taken as if proved beyond a reasonable doubt. A bill of exceptions, purporting to contain all the evidence, was silent as to such admissions having been made.
- Held*, that, as the record stood, there was no warrant for this statement of the court.....*Ibid*.
26. *Jury*.—*Instructions to*.—*Right of to Determine the Law*.—The court in such case also instructed the jury, that it was their duty to apply the law, as given by the court, to the facts of the case; that they might determine the law for themselves, however; but that they should be well satisfied in their own minds of the incorrectness of the law as given by the court before assuming the responsibility of determining it for themselves.
- Held*, that this was error.....*Ibid*.
27. *Same*.—*Irrelevant Instructions*.—Instructions to the jury should be applicable to the evidence.....*Ibid*.
28. *Presumption*.—*Use of Deadly Weapon*.—*Contradictory Instructions*.—The intent to murder is not conclusively inferred from the deliberate use of a deadly weapon; and the error of giving an instruction to the jury to that effect on the trial of an indictment for murder, at the instance of the prosecution, is not cured by giving a contradictory and correct charge upon that subject at the request of the defendant...*Ibid*.
29. *Apparently Conflicting Instructions*.—In a criminal case, the court, instead of giving to the jury instructions which are apparently conflicting, though not so intended, and leaving the jury to conjecture which of them should be applied to a given state of facts, should generally tell the jury the state of facts to which the proposition of law announced is applicable.....*Ibid*.
30. *Insanity*.—Where a person is moved to the commission of an unlawful act by an insane impulse controlling his will and his judgment, he is not guilty of a crime; and if he is a monomaniac on any subject,

- it is wholly immaterial upon what subject, so that the insane impulse leads to the commission of the act. *Stevens v. The State*.....485
- 31.—*Same*.—*Knowledge of Right and Wrong*.—On the trial of an indictment for murder in the first degree, the court instructed the jury, that if they believed from the evidence "that the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that such act was one which he ought not to do, and if that act was at the same time contrary to the law of the State, then he is responsible for his acts." *Held*, that this is not law.....*Ibid*.
32. *Same*.—So far as a person acts under the influence of mental disease he is not criminally accountable; and the jury in a criminal case must be satisfied beyond a reasonable doubt of the defendant's mental capacity to commit the crime charged.....*Ibid*.
33. *Instructions to Jury*.—*Conflict of*. An erroneous instruction to the jury in a criminal case cannot be corrected by another instruction which states the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury. *Bradley v. The State*.....492
34. *Same*.—*Extracts from Books*.—The law which goes to the jury from the court should be given as law, unquestioned by authorities extracted from books.....*Ibid*.
35. *Reasonable Doubt*.—A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt as to the guilt of the accused—that is, unless he is so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests, under circumstances where there was no compulsion resting upon him to act at all. *Arnold v. The State*, 23 Ind. 170, explained.....*Ibid*.
36. *Same*.—On the trial of an indictment for murder in the first degree the court instructed the jury, in effect, that if the evidence satisfied them of the guilt of the defendant with such certainty that a prudent man would feel safe in acting upon such conviction in his own important affairs, then, in such case, there would be no reasonable doubt of the defendant's guilt. *Held*, that this test was too narrow.....*Ibid*.
37. *Insanity*.—The defendant in a criminal case is not required to prove his insanity in order to avail himself of that defense, but merely to create a reasonable doubt on this point, whereupon the burden of proving his sanity falls upon the state.....*Ibid*.
38. *Same*.—*Cognitive and Conative Faculties*.—Insanity is a disease which may impair or totally destroy either the understanding or the will, or both; and in a criminal case all symptoms of such disease and its effect upon these faculties should go to the jury, and they must determine, as a matter of fact, the mental condition of the defendant; and an instruction to them which limits their inquiry to the condition of the power to apprehend by the understanding is erroneous.....*Ibid*.
39. *Same*.—*Voluntary Drunkenness*.—*Continued Drunkenness*.—Voluntary drunkenness is no excuse for the commission of a crime, but insanity produced by continued drunkenness is a good defense in a criminal action.....*Ibid*.
40. *Same*.—*Hereditary*.—*Evidence*.—Evidence of the insanity of the mother and uncle or other relatives of the defendant in a criminal case must be disregarded if there be not other evidence tending to show that he was himself insane at the time he did the act charged.....*Ibid*.
41. *Presumption*.—*Use of Deadly Weapon*.—The intent to murder is not conclusively presumed from the deliberate use of a deadly weapon.....*Ibid*.
42. *Witness*.—*Discredit of by the Court*.—An attempt in an instruction to the jury in a criminal case to cast discredit upon a medical witness because he had attended the trial from a neighboring state to testify in behalf of the defendant, with the expectation that his expenses would be paid by the defend-

- ant or others for him, the defendant being a stranger to such witness, was disapproved.....*Ibid.*
43. *Homicide.—Malice.—Purpose to Kill.—Manslaughter.*—Although a person unlawfully and *purposely* kill a human being, yet if it be done in a sudden heat of passion, caused by a sufficient provocation, and in the absence of express malice, then malice will not be implied from the act, but the offense will be manslaughter. *Murphy v. The State*.....511
44. *Same.—Provocation by Words.*—Words only, however abusive and insulting they may be, cannot constitute such sufficient provocation to rebut the presumption of malice arising from the act, in such a case, and reduce the offense from murder to manslaughter.....*Ibid.*
45. *Same.—Deadly Weapon.*—If the act be perpetrated with a deadly weapon, so used as likely to produce death, the purpose to kill may be inferred from the act.....*Ibid.*
46. *Same.—Words.—Definition of.—Statute Construed.*—The word "voluntarily," in our statutory definition of manslaughter, means, by the free exercise of the will, done by design, purposely.....*Ibid.*
47. *Same.—Instruction to Jury.*—On the trial of an indictment for assault and battery with intent to murder, the court instructed the jury, in effect, that there can be no *purpose to kill* in manslaughter; and that if such a purpose be shown to exist, and if death result, the killing is murder.
- Held*, that this was error.....*Ibid.*
48. *False Pretenses.—Statute Construed.*—The statute 2 G. & H. 445, sec. 27, does not require, as an element of the offense thereby defined, that the false representation should be made for the purpose of accomplishing the particular thing which does result. A false pretense such as would tend to produce the result accomplished, an obtaining thereby, and designedly, a thing of value from another, and an intention by the transaction to defraud that other, are the only elements of the offense. *Todd v. The State*.....514
49. *Same.—Indictment.*—If a particular result is designed to be accomplished by making the false pretense, which however fails, and another thing of value is obtained and accepted with like intent to defraud, the law imputes to the person making the false pretense a design from the beginning to consummate the latter result; and under our criminal code this conclusion of law from the facts need not be alleged in the indictment, if the facts are alleged from which it inevitably results.*Ibid.*
50. *Same.*—Indictment against T. for obtaining money and a signature as surety by false pretenses, charging that the defendant, "on, &c., at, &c., feloniously, designedly, and with intent to defraud one G., did falsely pretend to said G., that he, said T., was then and there the owner of a certain house and lot in a town named, in an adjoining state named, of great value, to wit, twenty-six hundred dollars, and a certain harness-shop, in another town named, in said adjoining state named, of great value, to wit, six hundred and fifty dollars; by means of which false pretenses, the said G. relying upon and believing the same to be true, said T. did then and there feloniously obtain from said G., on his, said T.'s, sole and individual credit, the sum of four hundred dollars, lawful money, as a loan for nine months, and the signature of said G. &c., &c., with intent then and there to defraud said G.; whereas, in truth, said T. was not then and there the owner," &c., &c.
- Held*, that the indictment was not double.
- Held*, also, that though it was not alleged expressly that in making the representations the defendant's intention was to accomplish the particular result which was in fact obtained—though the indictment was not so certain as to exclude the conclusion that the defendant may have designed to accomplish his fraudulent purpose in another mode—yet it sufficiently showed a connection between the false representations made and the result produced.*Ibid.*
51. *Same.—Evidence.*—It was not necessary to prove all the pretenses charged in the indictment.....*Ibid.*
52. *Same.—Similar Representations to Others.*—The State was allowed, over defendant's objection, to put in

evidence representations of the defendant similar to those charged in the indictment, made to other persons than G., not in the presence of G., and not at the time the representations were made to G.

Held, that this was error.....*Ibid*.

53. *Same.—Hearsay.*—The false representations appeared to have been made, and the money and signature obtained in January, at which time defendant referred G. to one B., for information as to the ownership and character of the house and lot of which the defendant represented himself as the owner; and the State put in evidence the declaration of B., made in the following November, that the defendant did not own any house and lot in said town.

Held, that this declaration was not admissible in evidence.....*Ibid*.

54. *Same.—Representations of Value. Variance.*—It was proved that the defendant represented the house and lot to G. as worth \$2,200 or \$2,300, instead of the sum laid in the indictment.

Held, that this was a fatal variance.*Ibid*.

CROSS-COMPLAINT.

See PLEADING, 18.

D

DAMAGES.

Measure of; usurpation. See OFFICE AND OFFICER, 3, 4, 5.

1. *Liquidated Damages.*—Where a party covenants for the abstaining from doing, or for the performance of, some particular act or acts which are not measurable by any exact pecuniary standard, and it is agreed that the party so covenanting shall pay a stipulated sum for a violation of any of such covenants, that sum is to be deemed liquidated damages, and not a penalty. *Studabaker et al. v. White*.....211

2. *Same.—Bond.—Restraint of Trade. Liquor Traffic.*—Bond for \$1,000, conditioned that the obligor should sell no more spirituous or malt liquors or wine, within a county named, after a specified date, or cause the same to be sold within said county, either directly or indirectly,

after the time specified, or manufacture or obtain any spirituous or malt liquors or wine, or cause to be sold, in said county, by himself or any other person, either directly or indirectly, after said date; that he should settle a certain obligation calling for liquors, payable to a third person named, of a certain sum mentioned, so that the liquors should not be brought to a town named, in said county; and should use his influence to prevent any person or persons from bringing any of the aforesaid liquors to said town with the intention of selling the same within the town.

Held, that such a bond is valid in this State.

Held, also, that said sum of \$1,000 was liquidated damages, and not a penalty.

Held, also, that the failure of the obligor to deliver any liquor in fulfillment of his contract with such third person, would not have been a breach of the condition of the bond.....*Ibid*.

3. *New Trial.—Excessive Damages.*—The assignment of excessive damages as a cause in a motion for a new trial is the only method by which that question can be raised. *City of Indianapolis v. Parker, Sheriff*.230

4. *Contract.—Breach of.—Measure of Damages.*—Where a person contracts to do a certain amount of work, at a stipulated price, upon materials to be furnished by his employer, within a specified time, and is ready and willing to perform, but is prevented by the failure of the employer to furnish materials as promised, he is entitled to merely compensatory damages; and where during such time he is offered other employment of the same kind, he is not entitled to the whole amount of profits he would have made if the contract had been fully performed by both parties. *Heavilon et al. v. Kramer*.....241

DEADLY WEAPON.

See CRIMINAL LAW, 28, 41, 43.

DECEDENTS' ESTATES.

See HUSBAND AND WIFE, 1, 2, 20;

PLEADING, 24; PROMISSORY NOTE, 4, 5; WIDOW, 2, 3, 4.

Sale of real estate to pay debts; appeal from interlocutory order. See APPEAL, 1.

1. *Parties.—Heirs.*—The heirs at law of a decedent against whose estate it appears there exists any debts cannot maintain an action for money due the estate. *Walpole's Adm. v. Bishop et al.*.....156

2. *Same.*—Suit by the heirs at law of A. against the administrator of B., to recover money collected by B. in his lifetime, as attorney of A. The complaint alleged, that, in the same year that A. died, an administrator of his estate was appointed, who six years afterwards resigned his trust; that no assets ever came to his hands; that no claims against A's estate were ever filed in court; that no other administrator of A's estate was ever appointed; that the widow of A. paid all the claims that were presented or that she knew existed against his estate, and fully administered the same years before.

Held, that these plaintiffs could not maintain the action.....*Ibid.*

3. *Proceeding to sell Real Estate.—Jurisdiction.*—An application to sell lands in the course of administration stands upon the footing of an ordinary adversary judicial proceeding in a court of superior jurisdiction. *Spaulding et al. v. Baldwin.* 376

4. *Same.—Collateral Proceeding.*—Where jurisdiction has been acquired in such a proceeding, subsequent errors in the course of its exercise—as in the order of sale and its confirmation—however grave and glaring, will not subject the judgment to successful collateral attack..*Ibid.*

DECEIT.

See SALE, 7, 8, 9, 10.

DEED.

See VOLUNTARY CONVEYANCE, 1, 2, 3.

DEFINITION.

Words. See CRIMINAL LAW, 5, 6, 46.

DELIVERY.

Of goods by Carrier. See COMMON CARRIER, 1, 2, 3, 4.

DEMAND.

See ATTORNEY.

DEMURRER.

See PLEADING, 6, 8, 10, 16, 17, 18, 19, 22, 25.

DEPOSITION.

Suppression of.—It is a sufficient reason for suppressing portions of a deposition, that such portions only tend to prove matters set up in a special answer and cross complaint to which a demurrer has properly been sustained. *Paine et al. v. The Lake Erie & Louisville R. R. Co.* 283

DEPUTY.

See OFFICE AND OFFICER, 1, 2.

DESCENT.

See HUSBAND AND WIFE, 1; WIDOW, 2, 3.

1. *Widow.—Rights in Husband's Real Estate.*—The rights of a surviving wife in the real estate of her husband are, in this State, those created by statute alone. *Gaylord et al. v. Dodge.*.....41

2. *Same.—Trust.*—A. purchased from B. certain real estate, for which he paid in money and in other land in the conveyance of which to B. the wife of A. joined with her husband. At A.'s request and without the knowledge or consent of his wife, who supposed that the entire property so bought from B. was conveyed to her husband, a portion of it was conveyed by B., by deed absolute on its face, to C., a son of A. by a former marriage, and the deed was delivered by B. to A. Nothing of the transaction was known by C. till he received, in due course of mail, at his place of residence in another state, a letter written to him by A. on the day of the conveyance, informing him of the purchase and of the making of the deed to him as aforesaid, and that A. would want a deed from C., in a

few days, to the children of E. and F., daughters of A. by said former marriage; that A. would send a deed for C. to sign in a few days; that the property was then in C.'s name, and that A. wished C. to tell the wife of the latter how it was situated then, so that she would know all about it if C. should be taken away; and if A. should, he wished the property so deeded to C. to be made over to said children, the rents and profits to be paid them yearly for their support, and when they should become twenty-one years old, "to have the property in fee simple, to be disposed of as they please;" that A. thought he had bought the B. property very low; that it cost B. a certain sum, "and as property is advancing, it must bring that again, but I shall not sell, as it is in a good location, and will let the children have it;" and requesting C. to not let any one know but that he (C.) had paid for half the B. property. C. immediately answered A. by letter, acknowledging the receipt of the letter from A., and saying that C. had told his wife about the arrangement A. proposed making in case C. should be taken away, and that she would follow the injunction of A.'s letter, in that event. C. and his said wife had no children. Subsequently, without consideration, at A.'s request, C. and his said wife conveyed said real estate to A. for life, then in separate parcels, to E. and F. for life, remainders in fee simple to said children of E. and F. After the execution of the deed from B., A. made expensive improvements on the land so conveyed to C., collected rents, and paid taxes and assessments of all kinds. A. died, intestate, leaving his said wife and issue by her surviving him.

Held, that no use or trust resulted in favor of A. from said conveyance of B. to C., and that said letters did not create a trust in favor of A. or confer on him the right to the use, control, or disposition of the property conveyed to C., but that said letters did create a trust in favor of the children of E. and F., which a court of equity would have enforced.

Held, also, that the variation in the agreement between A. and C. did

not affect the rights of A.'s surviving wife.

Held, also, that no interest in the real estate so conveyed to and by C. descended under the statute to the widow of A. *Ibid.*

3. *Surviving Second Wife Without Children.—Creditors.*—Where a man dies, leaving surviving him a widow, a second or other subsequent wife by whom he has no children, and children by a previous wife, the widow, *as against creditors*, takes the same share of his real estate, by descent, in fee simple, as if a first wife; and at her death this fee simple descends to her said husband's children free from the demands of his creditors. *Louden, Admr. v. James et al.* 69

4. *Widow.*—A surviving wife who has accepted the provision made for her by the will of her deceased husband is entitled also to the sum of \$300 allowed her by section 21, 1 G. & H. 295. *Dunham v. Toppan et al.* 173

5. *Same.—Statute of Limitations.*—A man died in 1854, seized in fee simple of certain real estate, leaving surviving him a widow and brothers and sisters, but no child, or father, or mother. The widow took possession of the entire property. Suit for partition, the plaintiffs claiming title to an undivided interest in the land as brothers and sisters of the deceased.

Held, that it was a sufficient answer, that before the commencement of the action more than ninety days had elapsed from the 9th of March, 1867, when section 3 of the act of March 4th, 1853, (Acts 1853, p. 55), was repealed and such limitation fixed to the right of action under its provisions. (Acts 1867, p. 204). *De Moss et al. v. Newton et al.* 219

6. *Surviving Wife.—Mortgage.*—A man during marriage purchased certain land, which he entered upon and improved and of which he received from his vendor a deed of conveyance in fee simple, which was lost, misplaced, or destroyed by the grantee, without having been recorded; and, with his consent, another deed was made to his son by said vendor. Afterwards the father and son executed a mortgage of the land, in which the wife of

the former did not join. The father, son, and said wife resided as one family upon the land and cultivated it from the time of said purchase till the father and son died, leaving said wife surviving and said mortgage unpaid.
Held, that the surviving wife was entitled to one-third of the land in fee simple as against the mortgagee seeking to foreclose his mortgage.
Sutton v. Jervis.....265

DESERTER.

See ARREST.

DILIGENCE.

See COMMON CARRIER; RAILROAD; RE-SCISSION, 5.

DIRECTORS.

See RAILROAD, 14, 15.

DISCLAIMER.

See PARTIES, 8.

DISMISSAL.

See PARTIES, 8.

DIVORCE.

See HUSBAND AND WIFE, 12.

Interrogatories.—Evidence.—Interrogatories to be answered under oath by the defendant cannot properly be filed with the answer to a cross petition in an action for divorce; and if filed and answered, the answers cannot properly be introduced in evidence. *Barr v. Barr*.....240

DRUNKENNESS.

See CRIMINAL LAW, 39.

DURESS.

1. *Pleading.*—An answer setting up coercion must aver the facts constituting it. *Richardson v. Little*..119
2. *Husband and Wife.*—Much less force or putting in fear by a husband will amount to coercion which will

avoid the deed of his wife than would be sufficient coming from a stranger.....*Ibid*.

3. *Same.—Wife's Separate Property Mortgage.*—Suit upon a note payable in bank and a mortgage to secure the same, executed by husband and wife and assigned to the plaintiff. Answer by the wife, showing that the note and mortgage were given for the debt of the husband, and that the land mortgaged was the separate property of the wife, and averring, "that she was induced by the persuasions of said payee and the coercion of her said husband to execute said note and mortgage."

Held, that the answer was bad on demurrer..... *Ibid*.

DYING DECLARATIONS.

See CRIMINAL LAW, 13, 16.

E

EASEMENT.

See HIGHWAY.

EJECTMENT.

See VOLUNTARY CONVEYANCE, 3.

New Trial.—As of Right.—There is no error in overruling a motion for a new trial as of right in an action of ejectment, where no proof is presented to the court that the costs have been paid. *McSheely v. Bentley*.....235

ELECTION.

See COURT OF COMMON PLEAS, 2; OFFICE AND OFFICER, 3, 4, 5.

Contest of.—Affidavit.—The affidavit of an elector instituting a contest of an election, under the act of May 4th, 1852 (1 G. & H. 316), requiring of such contestor "a written statement specifying the grounds of contest, verified by the affidavit of such elector," is not bad for qualifying the averment of the truth of such statement by the words, "as he is informed and verily believes." *Curry v. Baker, Governor*.....151

EQUITY.

See HUSBAND AND WIFE, 5, 9, 10; JURISDICTION, 12, 13; PRACTICE, 2, 3.

ESTOPPEL.

See PARTITION OF LANDS, 2; TURNPIKE, 4; WILL, 2.

See SOWLE v. HOLDRIDGE, 293.

1. *Conveyance to Husband and Wife. Partition.*—Where, at the suit of a widow against the children and heirs at law of her husband for partition of land conveyed to the husband and wife jointly, in accordance with the prayer of the petition a moiety was set off to the widow in her own right and the other moiety was divided between the widow and children as land descended to them from the husband;

Held, in a suit by the administrator of the husband's estate to subject to sale for the payment of the decedent's debts the land so set apart to said children and heirs at law, that the widow and heirs were not estopped by the proceedings in the partition suit from denying that the husband died seized in fee of a moiety of the land, or from asserting the truth in relation to the title. *Simpson et al. v. Pearson, Adm'r...* 1

2. *In Pais.*—Where an act is done or a statement made by a person, which cannot be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere evidence; the estoppel being limited within such bounds as are sufficient to put those who have dealt on the faith of appearances that turn out to be incorrect in the same position with reference to the author of such appearances as if they were true. *The State, ex rel. McCarty, v. Pepper et al.*.....76

3. *Same.—Principal and Surety.—Bond.*—When a bond has been signed and delivered to the principal obligor by a surety, upon the condition that others, not named in the instrument, shall sign before it is delivered to the obligee, and it is delivered without such signatures

being obtained, and received by the obligee without notice of such condition or circumstances which should put him upon inquiry, the condition imposed will not avail the surety. This is not a question of the power of the principal to deliver the bond in its apparently perfect condition, but simply a question of estoppel.....*Ibid.*

4. *Same.—Blanks.*—A surety signing and delivering to the principal obligor a bond before the names of the sureties have been inserted in the body of the instrument will be held as agreeing that the blank for such names may be filled after he has executed it.....*Ibid.*

5. *Same.—Signing after Forged Signature.*—A surety signed a county treasurer's official bond, at the request of the principal obligor, after the signatures of other sureties, without reading it or hearing it read, or asking what it was, upon being told by the principal that it was a county paper.

Held, that such surety was not released by the fact that one of the signatures before his was forged.....*Ibid.*

6. *Corporation.*—It is well settled in this State, that where one contracts with what purports to be a corporation, he is estopped from denying the existence of the corporation at the date of the contract. *McBroom v. The Corporation of Lebanon*....269

EVIDENCE.

See BILL OF EXCEPTIONS, 2; CONTRACT, 11; CRIMINAL LAW, 20, 22, 24, 25, 51 to 54; DIVORCE; HUSBAND AND WIFE, 14; INSANITY, 4, 5, 7; JUSTIFICATION, 3, 4; NEW TRIAL, 3, 4; PRACTICE, 14.

1. *Will.—Mistake.*—Parol evidence, or evidence *dehors* the will, is not admissible to correct an alleged mistake of a testator which is not apparent upon the face of the will. *McAlister et al. v. Butterfield et al.* 25

2. *Same.*—A testator, having devised certain real estate to his widow for life and directed that at her death it should be sold and the proceeds divided equally between his heirs, and bequeathed his personal estate to be equally divided between his lawful

heirs, directed that the remainder of his real estate be sold and the proceeds "equally divided between my lawful heirs, after deducting the amounts that the following named heirs have received: * * * My daughter F. has received \$2,100; J. has received \$1,000. I want my heirs to be made equal, and the remainder of my estate to be equally divided between my heirs."

Complaint by F. and J. against the widow, the other heirs and devisees, and the executor, alleging, that the testator recited and charged said sums against the plaintiffs erroneously, through mistake and inadvertence; that, in truth, F. had received only \$300, and J. had received no advancement whatever. Prayer, that the mistake be corrected, and that, in making distribution under the will, the advancement charged to J. be excluded, and that charged to F. reduced to \$300.

Held, that the matter sought to be contradicted was not simply the recital of a fact (although if merely such the plaintiffs would, it seemed, have been estopped from denying the truth of the recital), but also a limitation upon the interest of the plaintiffs in the estate devised.

Held, also, that evidence *dehors* the will was not admissible to prove the alleged mistake.

Held, therefore, that the complaint was bad on demurrer.....*Ibid*.

3. *Dying Declarations.—When Admitted.*—Where the statements of a person are offered in evidence as his dying declarations, the proof must clearly show that the declarant was in fact at the very point of death, and that he was fully conscious of that fact, not as a thing of surmise and conjecture or apprehension, but as a fixed and inevitable fact. *Morgan v. The State*.....193

4. *Same.*—It is not required that the deceased should have declared in terms that he expected to die at once, if his condition was such that, of necessity, such an impression must have existed on his mind. On the other hand, no matter how strong the expression of this certainty of death may have been, if there be

any evidence of hope in the language or actions of the declarant, his statements will be rejected..*Ibid*.

5. *Sale.—Deceit.—Examination of Goods by Jury.*—Upon the trial of an action for deceit in the sale of a quantity of flour, its quality at the time of the sale being in question, the court refused to permit the flour to be examined by the jury, to test its odor.

Held, that it was properly excluded. *Hagee et al. v. Grossman*.....223

6. *Number of Witnesses.*—A party cannot lawfully be limited by the court to one witness upon a vital point in issue. *Hubble v. Osborn*.249

7. *Same.—Resulting Trust.*—Suit by A. against B. and C. for possession of certain real estate purchased by the plaintiff at sheriff's sale on an execution in favor of the plaintiff issued upon a judgment against B., the legal title at the time of such sale standing in the name of C., to whom it had been conveyed by D. The plaintiff claimed that B. had paid the purchase-money, and, to defraud his creditors, particularly the plaintiff, to whom he was then largely indebted, procured the conveyance to be made by D. to C. It was claimed in defense, that in making the purchase B. acted as the authorized agent of C., who was not present, and that B. advanced the purchase-money in pursuance of an agreement with C. by which he was to so advance it as a short loan to C., who soon afterwards repaid the money. On the trial, B. testified to this effect, and C. testified to the same facts, except as to the fact of the loan, concerning which the court refused to allow him to testify.

Held, that this refusal was error..*Ibid*.

8. *Same.—Admissions.*—The admissions and declarations of the person paying the purchase money made after the conveyance to the other person, are not admissible in evidence against the latter.....*Ibid*.

9. *Statement of Evidence to Jury.—Bill of Exceptions.*—The statement of the evidence which a party is allowed to make to the jury by section 324 of the code is, as to its brevity or prolixity, a matter to be

- left, to a considerable extent, to the control of the court trying the cause; and where the interference of the court is complained of on appeal, the bill of exceptions must show the statement that was being made when the court interposed. *Aylesworth et al. v. Brown et al.*.....270
10. *Statute Book of Another State.*—A book purporting to be Swan and Critchfield's edition of the statutes of Ohio was offered and, over objection, admitted in evidence. By the title-page it appeared, that it was "published by the State of Ohio, and distributed to its officers, under the act of the General Assembly."
- Held*, that there was no error. *Paine et al. v. The Lake Erie & Louisville R. R. Co.*.....283
11. *Statute of Another State.*—*Corporation.*—*Pleading.*—Where a statute of another State constitutes a part of the organization of a corporation suing in this State, it is not necessary to its introduction in evidence by the plaintiff that it should have been pleaded.....*Ibid.*
12. *Parol Evidence.*—*Written Order.*—Trees were delivered to a buyer upon his written order directed to the seller, for certain trees at specified prices.
- Held*, that parol evidence was admissible to prove an agreement of the parties at the time of making said order, that the seller should replace any of the trees that might not grow. *Morehead v. Murray et al.*.....418
13. *Principal and Agent.*—*Declarations.*—As steps in proving the authority of one as an agent in the transaction in controversy, evidence of his similar transactions with different persons and of his declarations therein was held admissible*Ibid.*
- EXAMINATION OF WITNESS.**
- See* WITNESS, 1, 2, 4.
- EXCEPTIONS.**
- See* BILL OF EXCEPTIONS; PRACTICE, 8, 18, 28, 30.
- EXECUTION.**
- See* PRACTICE, 3; PRINCIPAL AND SURETY, 7.
- EXECUTOR AND ADMINISTRATOR.**
- See* DECEDENTS' ESTATES.
- EXHIBITS.**
- See* PLEADING, 21.
- EXPRESS COMPANY.**
- See* COMMON CARRIER, 1, 2, 3.
- F'**
- FALSE IMPRISONMENT.**
- See* ARREST.
- FALSE PRETENSES.**
- See* CRIMINAL LAW, 11, 48 to 54.
- FEEs.**
- See* OFFICE AND OFFICER, 1, 2.
- County Clerk.*—*Where Nolle Prosequi is Entered.*—A county is not liable to its clerk for fees taxed by him for services rendered in a criminal prosecution disposed of by a *nolle prosequi* being entered. *Board of Com'rs of Morgan Co. v. Johnson.*.....463
- FEME COVERT.**
- See* HUSBAND AND WIFE.
- FENCES.**
- See* RAILROAD, 1, 12.
- FINES.**
- See* CRIMINAL LAW, 23.
- FORGERY.**
- See* ESTOPPEL, 5.
1. *Indictment.*—An indictment for defacing and destroying a promissory note, in which it is alleged, as an excuse for not setting forth the tenor of the note, that it was destroyed by the defendant, must state its substance and effect. *Birdg v. The State*.....88

2. *Same*.—An indictment for defacing and destroying a promissory note must show whether the note was for the payment of money or property..... *Ibid*.

FRAUD.

See PLEADING, 12; PRACTICE, 5; RE-SCISSION, 1 to 6; TRUST, 8; VOLUNTARY CONVEYANCE, 3.

1. *Sale*.—*Agent*.—On a sale of goods it was agreed that the buyer should give to the seller, in payment, upon delivery of the goods, notes of solvent persons. A certain note so given was not such as the contract thus called for, and the buyer, knowing this, fraudulently deceived the seller's agent, to whom he delivered the note, knowing him to be such agent and knowing that the proceeds of the sale were to go to, and become the property of, the agent, who, on discovering the deceit, offered to return the note to the buyer and demanded of him other good notes. There being evidence of these facts in a suit by the seller against the buyer, the plaintiff bringing the note into court and offering to return it to the defendant; there was a finding for the plaintiff in a certain sum, and that the defendant be entitled to withdraw the note from the files of the court and hold it as his own.

Held, that the finding was correct. *Kinney v. Blythe*.....140

2. *Same*.—*Deceit*.—Where a seller of goods knowingly makes false representations to the buyer as to their quality, but the buyer does not rely upon such representations and is not deceived thereby, the seller is not liable in an action for deceit. *Hagee et al. v. Grossman*.....223

3. *Same*.—Where a seller has made false representations as to the quality of the goods, but the buyer, in making the purchase, relies on a test of their quality made by his own agent, who is not prevented by any act or word of the seller from testing the goods, the seller is not liable for deceit.....*Ibid*.

4. *Railroad*.—*Directors*.—Persons who are directors of a railroad company cannot acquire such an interest in

the profits of a contract for the construction of the road as to give them a standing in a court of equity to interpose an objection to the consummation of a compromise between the railroad company and its contractor. *Paine et al. v. The Lake Erie & Louisville R. R. Co*.....283

5. *Same*.—*Stockholders*.—An arrangement made by persons who are directors of a railroad company with a contractor, by which such persons are to share in the profits of the contract for the construction of the road, can only be confirmed by the stockholders, and not by the directors of whom the guilty persons form a part.....*Ibid*.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See PRACTICE, 5.

FUGITIVE FROM JUSTICE.

Appeal.—No appeal by the State to the Supreme Court lies from the ruling of a judge discharging from arrest a prisoner brought before him for examination as provided by the act of March 9th, 1867 (Acts 1867, p. 126), "to regulate the arrest and surrender of fugitives from justice from other states and territories." *The State v. Morgan*.....66

G

GIFT.

See HUSBAND AND WIFE, 14.

GOVERNOR.

See COURT OF COMMON PLEAS, 2.

GRANT.

See GUARDIAN AND WARD, 7.

GRAVEL ROAD.

See TURNPIKE.

GUARDIAN AND WARD.

1. *Pleading*.—*Complaint*.—*Promise*.—

A complaint against a guardian, to recover for maintaining and providing for his ward, did not contain any averment of a request or promise made by the defendant, or any allegation that he had failed to provide, within the means in his hands as guardian, for the reasonable wants of his ward.

Held, that the complaint was bad on demurrer for want of sufficient facts. *Gwaltney, Guard., v. Cannon*.....227

2. *Jurisdiction.—Associate Judges.*—The Associate Judges, as a Court of Probate, had jurisdiction on the 10th of August, 1829, to appoint guardians for infants, and such court was a court of record. It had jurisdiction of guardians' petitions to sell lands. Such jurisdiction extended to lands situated anywhere within the State. Though the law required a bond to be given before entering the order of sale, the failure to require one would not render the proceeding void. *Dequindre et al. v. Williams*.....444

3. *Same.—Probate Court.*—The Probate Court, upon its organization under the act of 1829, had authority to take jurisdiction of matters in relation to guardians and wards then pending in such Court of Probate held by the Associate Judges, and conduct them to conclusion.....*Ibid.*

4. *Same.—Collateral Proceeding.*—Where a proceeding in a court of superior jurisdiction is of such a character that upon final action the court should, from the nature of the case, ascertain whether it is such in fact that it has jurisdiction to act as it is invoked to do, and it does so act, the matter cannot be questioned collaterally.....*Ibid.*

5. *Same.—Residence of Ward.*—The Associate Judges, as a Court of Probate, on the 10th of August, 1829, appointed a guardian for certain infants.

Held, that an inquiry as to whether the infants were at the time of such appointment residents of this or another state, could not be raised collaterally.....*Ibid.*

6. *Same.—Vendor and Purchaser.—Guardian's Sale.—Application of Proceeds.*—Where a guardian who has received his appointment from a

court of superior jurisdiction having authority to make such appointments and jurisdiction of guardians' petitions to sell lands, but without jurisdiction to make the particular appointment, sells land of his ward, under an order of such court, to one who purchases and pays for such land, relying in good faith on such order, such purchaser will be protected in the title so acquired, if the guardian applies the proceeds properly. And in an action by the late ward, arrived at majority, to recover such land, a debt of the guardian against the deceased father of the ward, through whom the plaintiff claims title, allowed by such court as a credit to the guardian upon settlement, will be presumed to have been rightfully allowed.....*Ibid.*

7. *Indian Treaty.—Grant.—Relation.*—A section of land, to be located under the direction of the President, was granted to a certain person by an Indian treaty; and after the death of the grantee the proper court, upon petition of the guardian of the grantee's heirs at law, ordered the sale of the unlocated section; and, the land having been located by the assignee of the purchaser at such guardian's sale, the proper court ordered a conveyance of the specific land to such assignee, which was made, but never approved by the President.

Held, that, by the doctrine of relation, the treaty operated instantly in law as a grant, the subsequent location of the land merely ascertaining the specific thing which was granted.

Held, also, that the approval of the President was not necessary to the validity of the guardian's deed of conveyance.....*Ibid.*

8. *Same.—Case Stated.*—Suit by the heirs at law of A. against B., to recover certain real estate. Trial upon the following agreed statement of facts: A section of land was granted by treaty with the Potawatamies, of October 16th, 1826, to A., to be located under the direction of the President. It was located, in 1837, in Allen county, without the territory ceded by the Indians under said treaty, the premises in controversy being a part of that section. In

1828, A. died, in Illinois, where he then resided, leaving a widow and children surviving him, who continued to reside in Illinois until 1831, when they removed to Knox county, in this State, prior to which they had no property in Indiana, except the unlocated land. It appeared by the record of certain proceedings in Knox county, that on the 10th of August, 1829, the court doing probate business, held by the Associate Judges, appointed a guardian of A.'s children, the plaintiffs in this action, and that "there being no property," no bond was required. The bond required by law was to be in double the value of the personal property. On the following day, the guardian presented his petition to sell the unlocated section, and, after an appraisement at \$800, the sale was ordered, the guardian to give bond with sureties approved, within thirty days, but no such bond appeared in the transcript of the proceedings. The sale was to be private, for one-half cash and the balance in two equal annual instalments. In August, 1839, the guardian reported to the Probate Court, that in November, 1831, he had sold the tract for \$1,000 to one who transferred his right to another, and he to C., who paid the purchase-money and, after having procured the land to be located, died; the report describing the section located. The Probate Court confirmed the sale and directed a conveyance of the specific land to the heirs at law of C., which was accordingly delivered, but was never approved by the President. The title of C. and his heirs afterwards became vested in B., who, with his grantors, paid taxes on the land and took care of and protected it from 1841, though not in actual possession, till the commencement of this action, in 1835. From its location in 1837 till 1841 it was worth \$30 per acre. From January, 1829, till 1840, the United States, it was admitted, held public lands in Knox county and elsewhere, in this State, and other states. Upon this evidence the court found for the defendant.

Held, that the evidence sustained the finding *Ibid*.

H

HEIRS.

See PARTIES, 2, 3.

HIGHWAY.

See APPEAL, 3; *CRIMINAL LAW*, 3; *NUISANCE*, 1, 2.

See BROOKOVER v. FORST, 255.

1. *Practice.—Obstruction of Highway.—Injunction.*—In an action to enjoin the obstruction of a public highway within the limits of an incorporated town and under the jurisdiction and control of such corporation, brought by a plaintiff who predicates his right to such relief on the ground that he is the owner of certain lots fronting upon the highway obstructed, such corporation is not a necessary party plaintiff. *Debolt v. Carter et al.*.....355

2. *Same.—Another Action Pending.*—Suit by the owner of certain town lots, denying the existence of a highway upon and along a portion thereof, as claimed by the defendant, and seeking to quiet the plaintiff's possession of the lots, freed from the claim of such highway, praying a perpetual injunction against the defendant, restraining him from disturbing the plaintiff's possession or asserting an easement over the lots as a public highway. After answer and reply, the defendant filed a cross complaint, asserting the existence of an easement as a public highway over a part of said lots, charging the plaintiff with having unlawfully obstructed it, to the special injury of the defendant, and praying that the plaintiff be perpetually enjoined from repeating or continuing such obstruction.

Held, that the cross complaint was not bad on demurrer on the ground that another action was pending between the same parties for the same cause, to wit, the original complaint, the answer, and the reply.....*Ibid*.

3. *Usur.*—A county road was located by the board of county commissioners, in 1840, over certain lands, the location being defective for not specifying the width of the highway; but, in pursuance of the order of

the commissioners, the supervisor of the proper road district opened and improved the road, thirty feet in width, as a public highway, and it was continuously thereafter kept, maintained, and used by the public as a public highway, in the same place and of the same width, with the knowledge and consent of the owners of said lands, for more than twenty years.

Held, that these facts showed the existence of a public highway by user.....*Ibid.*

4. *Vacation of.—Town.*—The corporate limits of a certain town extended to and along the middle of a county road, thirty feet in width, located before the town was laid out.

Held, that the board of trustees of the town had not power under the ninth clause of section 22 of the act for the incorporation of towns, 1 G. & H. 624, to vacate so much of said highway as was within the corporate limits.....*Ibid.*

HOMICIDE.

See CRIMINAL LAW, 14, 15, 16, 28, 31, 36, 41, 43 to 47.

HUSBAND AND WIFE.

See VOLUNTARY CONVEYANCE, 2, 3.

1. *Conveyance to Husband and Wife.—Survivorship.*—Where real estate is conveyed in fee simple to a man and his wife, upon the death of the husband he leaves no estate in such land subject to the payment of his debts, or that descends to his heirs; but the widow becomes seized of the whole estate to her sole use, by virtue of her right of survivorship. *Simpson et al. v. Pearson, Adm'r.*....1
2. *Same.—Estoppel.*—Where, at the suit of a widow against the children and heirs at law of her husband for partition of land conveyed to the husband and wife jointly, in accordance with the prayer of the petition a moiety was set off to the widow in her own right and the other moiety was divided between the widow and children as land descended to them from the husband; *Held*, in a suit by the administrator of the husband's estate, to subject to

sale for the payment of the decedent's debts the land so set apart to said children and heirs at law, that the widow and heirs were not estopped by the proceedings in the partition suit from denying that the husband died seized in fee of a moiety of the land, or from asserting the truth in relation to the title. *Ibid.*

3. *Wife's Separate Real Estate.—Contract.*—In this State, in order to enforce the contract of a married woman against her separate real estate, her intent to deal with the property must appear, and may not be assumed, and the contract must be one from which benefit results to the property. *Kantrowitz et al. v. Prather et ux.*.....92

4. *Same.—Profits of Real Estate.*—So far as the profits of a married woman's real estate are concerned, effect will be given to her contract where she has indicated her purpose to deal with such profits.....*Ibid.*

5. *Same.—Protecting Supervision of Chancery.*—It must appear that any contract relating to the property of a married woman, which it is sought to enforce in equity, is conscionable, and where it relates to the betterment of her real estate, that it is reasonably calculated to promote that end.....*Ibid.*

6. *Same.—Intent.*—The fact that credit for goods sold to a married woman is given her upon the faith of her separate property, is not sufficient to create a charge against her land or its income; she must also herself intend to contract with regard to her separate estate.....*Ibid.*

7. *Same.—Wife's Power over her Real Estate.*—A married woman has, in this State, whatever power is incident to a complete holding and full enjoyment of her separate real estate, with a restriction upon her power to incumber or alienate the same. *Lindley et al. v. Cross et ux.*.....106

8. *Same.—Improvement of her Real Estate.*—Where an improvement made by a married woman upon her real estate is necessary and proper for a full and complete enjoyment of such real estate, she can charge her separate property with debts created in making the improvement.....*Ibid.*

9. *Same.—Court's Protecting Control.*—The power of a married woman to make new improvements upon her real estate, for the purpose of preventing its abuse, is under the control of the court trying the cause involving the liability of her separate property to answer for the debts so created.....*Ibid.*
10. *Same.—Pleading.—Mechanic's Lien.*—A complaint to enforce a material-man's lien for lumber furnished to erect a dwelling house upon the separate real estate of a married woman, the portion relating to the lien showing an insufficient notice, was held bad on demurrer, for want of averment that the dwelling house was necessary and proper for a full and complete enjoyment by the married woman of the real estate in question.....*Ibid.*
11. *Contract.*—Our statutes do not change the rule of the common law, so far as it applies to the contracts at large of a married woman, that she is incapable of binding herself by an executory contract, and that all such contracts made by her, whether in writing or by parol, are absolutely void at law. *O'Daily v. Morris*111
12. *Same.—Promissory Note.*—A married woman carrying on a business in her own name and living with her husband, whom by a written instrument she had made her agent to manage her business, borrowed for her own use a sum of money, which was delivered to her personally, for which she and her husband executed a promissory note, the payee relying on her for its payment. *Held*, in a suit on the note, after the woman had been divorced from her said husband and while she was still unmarried, that she was not personally liable on the note.....*Ibid.*
13. *Wife's Separate Property.—Partner.*—A married woman cannot bind herself as the partner of her husband; nor do the facts that she holds herself out as such partner and that her property gives credit to the pretended firm, charge her property with an indebtedness contracted by such firm in the course of trade. *Montgomery et ux. v. Sprankle et al.*.....113
14. *Same.—Husband's Debts.—Evidence.*—A married woman carried on the business of a clothing merchant in her own name, employing her husband as a clerk, the money invested in the business having been received by her during coverture, through a trustee, as a gift from her brother, to be invested in such business, and when so invested to be under her sole control, the business to be carried on in her name and for her sole use and benefit, and in the event of her death the money to go to her children by her said husband. *Held*, that personal property purchased by her with the proceeds of said business was not subject to the debts of her said husband. *Held*, also, in a suit by such married woman to recover such personal property, levied upon under an execution issued on a judgment against her said husband, that there was no error in admitting in evidence a written agreement between her said brother and said trustee, under which the money was advanced to her, its execution having been proved. *Bellows et al. v. Rosenthal.*.....116
15. *Same.—Rents and Profits.*—The ruling in *Kantrowitz v. Prather*, ante, p. 92, adhered to. *Copeland v. Cunningham et ux.*.....116
16. *Duress.*—Much less force or putting in fear by a husband will amount to coercion which will avoid the deed of his wife than would be necessary coming from a stranger. *Richardson v. Hittle.*.....119
17. *Same.—Wife's Separate Property. Mortgage.*—Suit upon a note payable in bank and a mortgage to secure the same, executed by husband and wife and assigned to the plaintiff. Answer by the wife, showing that the note and mortgage were given for the debt of the husband, and that the land mortgaged was the separate property of the wife, and averring, "that she was induced by the persuasions of said payee and the coercion of her said husband to execute said note and mortgage." *Held*, that the answer was bad on demurrer.....*Ibid.*
18. *Wife's Separate Real Estate.—Contract.*—In this State, a married woman can charge her real estate by such contracts only as are rea-

- sonably calculated to make the estate profitable to her, or to preserve it, or to protect her title thereto. *Smith v. Howe et ux*.....233
19. *Same*.—A married woman who owns real estate in her own separate right and is in the habit of making contracts in her own name without the co-operation of her husband, who has abandoned her and is residing in another state, cannot charge such real estate by her written agreement to pay a certain sum to a third person if he will tell her the whereabouts of her husband so that she can find him.....*Ibid*.
20. *Agency of Husband*.—A man loaned money belonging to his wife, taking notes therefor in his own name, but declaring at the time, that it was his wife's money, and afterwards kept the notes distinct from those received on the loan of other funds. The administrator of the husband's estate took possession of such notes as a part of the estate, with notice of the wife's claim thereon, and collected the money thereon. *Held*, that the administrator was liable to the wife for the money so collected. *Fowler v. Rice*.....258

I

IMPRISONMENT.

Term of. See CRIMINAL LAW, 23.

IMPROVEMENTS.

See MORTGAGE, 1.

INCOHABITATION RIGHTS.

See REPEAL OF LAWS, 1, 2.

INCUMBRANCE.

See PRACTICE, 3; VENDOR AND PURCHASER, 2.

INDEMNITY.

See CONTRACT, 8.

INDIAN TREATY.

1. *Grant.—Relation*.—A section of land, to be located under the direction of the President, was granted to a cer-

tain person by an Indian treaty; and after the death of the grantee the proper court, upon petition of the guardian of the grantee's heirs at law, ordered the sale of the unlocated section; and, the land having been located by the assignee of the purchaser at such guardian's sale, the proper court ordered a conveyance of the specific land to such assignee, which was made, but never approved by the President.

Held, that, by the doctrine of relation, the treaty operated instantly in law as a grant, the subsequent location of the land merely ascertaining the specific thing which was granted.

Held, also, that the approval of the President was not necessary to the validity of the guardian's deed of conveyance. *Dequindre et al. v. Williams*.....444

2. *Same.—Case Stated*.—Suit by the heirs at law of A. against B., to recover certain real estate. Trial upon the following agreed statement of facts: A section of land was granted by treaty with the Potawatamies, of October 16th, 1826, to A., to be located under the direction of the President. It was located, in 1837, in Allen county, without the territory ceded by the Indians under said treaty, the premises in controversy being a part of that section. In 1828, A. died, in Illinois, where he then resided, leaving a widow and children surviving him, who continued to reside in Illinois until 1831, when they removed to Knox county, in this State, prior to which they had no property in Indiana, except the unlocated land. It appeared by the record of certain proceedings in Knox county, that on the 10th of August, 1829, the court doing probate business, held by the Associate Judges, appointed a guardian of A.'s children, the plaintiffs in this action, and that "there being no property," no bond was required. The bond required by law was to be in double the value of the personal property. On the following day, the guardian presented his petition to sell the unlocated section, and, after an appraisement at \$800, the sale was ordered, the guardian to give bond with sureties approved, within thirty days, but no such bond ap-

peared in the transcript of the proceedings. The sale was to be private, for one-half cash and the balance in two equal annual instalments. In August, 1839, the guardian reported to the Probate Court, that in November, 1831, he had sold the float for \$1,000 to one who transferred his right to another, and he to C., who paid the purchase-money and, after having procured the land to be located, died; the report describing the section located. The Probate Court confirmed the sale and directed a conveyance of the specific land to the heirs at law of C., which was accordingly delivered, but was never approved by the President. The title of C. and his heirs afterwards became vested in B., who, with his grantors, paid taxes on the land and took care of and protected it from 1841, though not in actual possession, till the commencement of this action, in 1865. From its location in 1837 till 1841 it was worth \$30 per acre. From January, 1829, till 1840, the United States, it was admitted, held public lands in Knox county and elsewhere in this State and other states. Upon this evidence the court found for the defendant.

Held, that the evidence sustained the finding *Ibid*.

INDICTMENT.

See CRIMINAL LAW, 4, 5, 11, 49, 50; FORGERY, 1, 2.

INFORMATION.

See CRIMINAL LAW, 1, 2, 9, 10, 17.

INJUNCTION.

See MORTGAGE, 1; TURNPIKE, 3.

1. *County Clerk.—Deputy.—Compensation of.*—A county clerk may contract with his deputy that the latter for his compensation shall have a certain share of the fees taxed and collectable in the clerk's office during his deputyship; and in a suit by such deputy against his principal to recover the former's share of such fees, an injunction may be granted, pending the cause, restraining the

clerk from collecting or transferring such fees yet unpaid, and the sheriff from paying such fees collected by him to the clerk; and a receiver may be appointed. *Cheek et al. v. Tilley* 121

2. *Pleading.—Amendment.*—An amendment called a "supplemental complaint," but containing no supplemental matter, was filed by the plaintiff, over the defendant's objection, before answer, in a suit for an injunction in which a restraining order had been granted.

Held, that there was no error..... *Ibid*.

3. *Motion to Dissolve.*—Motion based upon affidavits, to dissolve an injunction before answer. The defendant in his affidavit did not deny certain equities of the complaint, and so much of the complaint essential to the injunction as he denied was supported by other affidavits.

Held, that, under the chancery practice, the injunction should not have been dissolved, and that the code does not change the former rule on that subject *Ibid*.

4. *Nuisance.—Obstructing Highway.*—A private person cannot enjoin the obstruction of a public highway without showing a special and peculiar injury to himself, not common to the public. The fact that the injury to such person is greater in degree than that to others does not entitle him to such relief. The injury may be to more than one person, but must not embrace the entire public. *McCowan et al. v. Whitesides*..... 235

5. *Same.*—In a complaint to enjoin the obstructing of a public highway, the only averments connecting the plaintiffs with the highway were, "that it is their usual, convenient, and necessary route of travel from their houses, which are all on, or in the vicinity of, the road, to their market town and usual place of business; and that without greater or less circuitry, when the road is so obstructed, they and each of them have no other means, nor have the public wishing to use the road, of going to and fro, as they have a right to do, for business, comfort, and pleasure."

Held, that the complaint was bad on demurrer *Ibid*.

INJURIA SINE DAMNO.

See RESCISSION, G.

INSANITY.

1. *Criminal Law*.—Where a person is moved to the commission of an unlawful act by an insane impulse, controlling his will and his judgment, he is not guilty of a crime; and if he is a monomaniac on any subject, it is wholly immaterial upon what subject, so that the insane impulse leads to the commission of the act. *Stevens v. The State*.....485
2. *Same*.—*Knowledge of Right and Wrong*.—On the trial of an indictment for murder in the first degree, the court instructed the jury, that if they believed from the evidence "that the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that such act was one which he ought not to do, and if that act was at the same time contrary to the law of the State, then he is responsible for his acts." *Held*, that this is not law.....*Ibid*.
3. *Same*.—So far as a person acts under the influence of mental disease, he is not criminally accountable; and the jury in a criminal case must be satisfied beyond a reasonable doubt of the defendant's mental capacity to commit the crime charged.....*Ibid*.
4. *Same*.—*Evidence*.—The defendant in a criminal case is not required to prove his insanity in order to avail himself of that defense, but merely to create a reasonable doubt on this point, whereupon the burden of proving his sanity falls upon the state. *Bradley v. The State*.....492
5. *Same*.—*Cognitive and Conative Faculties*.—Insanity is a disease which may impair or totally destroy either the understanding or the will, or both; and in a criminal case all symptoms of such disease and its effect upon these faculties should go to the jury, and they must determine, as a matter of fact, the mental condition of the defendant; and an instruction to them which limits their inquiry to the condition of the power to apprehend by the understanding is erroneous.....*Ibid*.

6. *Same*.—*Voluntary Drunkenness*.—*Continued Drunkenness*.—Voluntary drunkenness is no excuse for the commission of a crime, but insanity produced by continued drunkenness is a good defense in a criminal action.....*Ibid*.
7. *Same*.—*Hereditary*.—*Evidence*.—Evidence of the insanity of the mother and uncle or other relatives of the defendant in a criminal case must be disregarded, if there be not other evidence tending to show that he was himself insane at the time he did the act charged.....*Ibid*.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 25 to 29, 36, 42; PRACTICE, 11.

1. *Conflict of*.—An erroneous instruction to the jury in a criminal case cannot be corrected by another instruction which states the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury. *Bradley v. The State*492
2. *Same*.—*Extracts from Books*.—The law which goes to the jury from the court should be given as law, unquestioned by authorities extracted from books.....*Ibid*.

INTEREST.

See ATTORNEY; PRINCIPAL AND SURETY.

- 1, 2.
1. *Rate of upon Judgments*.—The act of 1867, increasing the maximum rate of interest to ten per cent., when that rate is provided for by contract in writing, does not affect the third section of the act of 1861, enacting, that "interest on a judgment, or decree for money, shall be from the date of signing until the same be satisfied, at the rate per cent. agreed upon by the parties in the original contract, *not exceeding six per cent.*, and if there was no contract by the parties as to interest, then at the rate of six dollars a year on one hundred dollars." *Smith v. Thomas*.....280
2. *Same*.—Suit on a promissory note, dated April 8th, 1868, and providing for the payment of interest at

the rate of ten per cent. The court refused to require, as prayed by the complaint, that the judgment should draw interest at the rate of ten per cent.

Held, that this was not error.....*Ibid*.

3. *Contract.—Remedy.*—Where a person contracts for the payment of a higher rate of interest than can at the time be lawfully contracted for, but the law in force at the time the remedy is sought against him allows parties to contract for the payment of such higher rate, the latter law controls. *Klingensmith et al. v. Reed*.....389

INTERROGATORIES.

See PRACTICE, 30.

1. *Divorce.—Evidence.*—Interrogatories to be answered under oath by the defendant cannot properly be filed with the answer to a cross petition in an action for a divorce; and if filed and answered, the answers cannot properly be introduced in evidence. *Barr v. Barr*.....240
2. *Harmless Error.*—Where the defendant filed, with his answer, interrogatories to the plaintiff, which were answered, but the answers were not sufficient, and the court erroneously refused to compel him to answer; but it appeared by the record that the plaintiff was sworn as a witness, and as such testified fully to the facts sought to be elicited by the interrogatories, fully supporting, in that respect, the averments of the answer;

Held, that the error could not avail the defendant. *Aylesworth et al. v. Brown et al*.....270

INTERROGATORIES TO JURY.

Special Verdict.—The court, of its own motion, required the jury, unconditionally, to answer certain interrogatories, which they answered without returning a general verdict.

Held, that the answers could stand as a special verdict. *Paine et al. v. The Lake Erie & Louisville R. R. Co*.283

INTOXICATION.

See INSANITY, 6.

Contract.—Where a party to a contract is voluntarily intoxicated at the time of making it, to the extent only that he does not clearly understand the business, this does not render his contract void or voidable, where no advantage is gained by dealing with him. *Henry v. Ritenour*.....136

J

JOINDER.

Of causes. See PRACTICE, 33.

Of parties. See CONTRACT, 8; PARTIES.

JOINT DEBTORS.

Release.—A. held a judgment against B. and C. for a certain amount; B. paid half the amount, and thereupon A. executed to him a written instrument wherein A. covenanted that he would thenceforth "pursue the legal and equitable remedy on said judgment against C. alone, and not against B., looking to C. alone for the full and final payment and satisfaction of said judgment, without, however, intending to prejudice or interfere with the rights and liabilities of said B. and C. to each other on account of said judgment."

Held, that this instrument did not operate as a release of C. from liability upon the judgment. *Aylesworth et al. v. Brown et al*.....270

JUDGE.

Of Court of Common Pleas; election of. See COURT OF COMMON PLEAS, 2.

JUDGMENT.

See ARREST OF JUDGMENT, 1, 2; JURISDICTION, 3, 5, 6, 7, 9; NAME; PRACTICE, 8.

Demand of. See PLEADING, 23, 24.

1. *Interest.—Rate of upon Judgment.* The act of 1867, increasing the maximum rate of interest to ten per cent., when that rate is provided for by contract in writing, does not affect the third section of the act of 1861, enacting, that "interest on a judgment, or decree for money, shall be from the date of signing until the same be satisfied, at the rate per

- cent. agreed upon by the parties in the original contract, *not exceeding six per cent.*, and if there was no contract by the parties as to interest, then at the rate of six dollars a year on one hundred dollars." *Smith v. Thomas*.....280
2. *Same*.—Suit on a promissory note, dated April 8th, 1868, and providing for the payment of interest at the rate of ten per cent. The court refused to require, as prayed by the complaint, that the judgment should draw interest at the rate of ten per cent.
- Held*, that this was not error.....*Ibid*.
3. *Form of.—Practice.—Supreme Court*.—No question can be made in the Supreme Court as to the form of a judgment, where no objection has been taken below. *Eaton et al. v. Burns et al.*.....390

JUDICIAL DISCRETION.

See EVIDENCE, 9.

JUDICIAL NOTICE.

Corporation.—This court does not judicially know that there is not, or cannot be, a corporation by the name of the "Corporation of Lebanon," under the laws of this State. *McBroom v. The Corporation of Lebanon*268

JURISDICTION.

See CRIMINAL LAW, 3, 24.

1. *Collateral Proceeding*.—It is well settled, that the proceedings of courts of inferior jurisdiction will be deemed of no validity unless their jurisdiction is affirmatively shown. *The Ohio & Mississippi R. Co. v. Shultz*.....150
2. *Title to Real Estate*.—Where the main object of a complaint in the court of common pleas is to have satisfaction entered of a mortgage of real estate, there is no error in overruling a motion made by the defendant, before answer, to transfer the cause to the circuit court on the ground that the title to real estate is in issue. *Paine et al. v. The Lake Erie & Louisville R. Co.*.....283
3. *Pleading*.—In pleading a record

of a judgment, it is unnecessary to show by averments that the court had jurisdiction. *Spaulding et al. v. Baldwin*.....376

4. *Decedents' Estates.—Proceeding to sell Real Estate*.—An application to sell lands in the course of administration stands upon the footing of an ordinary adversary judicial proceeding in a court of superior jurisdiction.....*Ibid*.
5. *Same.—Collateral Proceeding*.—Where jurisdiction has been acquired in such a proceeding, subsequent errors in the course of its exercise—as in the order of sale and its confirmation—however grave and glaring, will not subject the judgment to successful collateral attack.....*Ibid*.
6. *Same.—Pleading.—Exhibits*.—Where, in an action to recover possession of real estate, the defendant claims title through a sale and conveyance to him under an order of court granted upon the application of an administrator, to make assets to pay debts of the decedent, the answer need not aver that a real estate bond was filed, but copies of the record and the deed must be exhibited as parts of the answer.....*Ibid*.
7. *Associate Judges.—Guardian and Ward*.—The Associate Judges, as a Court of Probate, had jurisdiction on the 10th of August, 1829, to appoint guardians for infants, and such court was a court of record. It had jurisdiction of guardians' petitions to sell lands. Such jurisdiction extended to lands situated anywhere within the State. Though the law required a bond to be given before entering the order of sale, the failure to require one would not render the proceeding void. *Dequindre et al. v. Williams*.....444
8. *Same.—Probate Court*.—The Probate Court, upon its organization under the act of 1829, had authority to take jurisdiction of matters in relation to guardians and wards then pending in such Court of Probate held by the Associate Judges, and conduct them to conclusion.....*Ibid*.
9. *Collateral Proceeding*.—Where a proceeding in a court of superior jurisdiction is of such a character that upon final action the court should, from the nature of the case, ascertain whether it is such in fact

- that it has jurisdiction to act as it is invoked to do, and it does so act, the matter cannot be questioned collaterally.....*Ibid.*
10. *Same.—Residence of Ward.*—The Associate Judges, as a Court of Probate, on the 10th of August, 1829, appointed a guardian for certain infants.
Held, that an inquiry as to whether the infants were at the time of such appointment residents of this or another state, could not be raised collaterally.....*Ibid.*
11. *Same.—Vendor and Purchaser.—Guardian's Sale.—Application of Proceeds.*—Where a guardian, who has received his appointment from a court of superior jurisdiction having authority to make such appointments and jurisdiction of guardians' petitions to sell lands, but without jurisdiction to make the particular appointment, sells land of his ward, under an order of such court, to one who purchases and pays for such land, relying in good faith on such order, such purchaser will be protected in the title so acquired, if the guardian applies the proceeds properly. And in an action by the late ward, arrived at majority, to recover such land, a debt of the guardian against the deceased father of the ward, through whom the plaintiff claims title, allowed by such court as a credit to the guardian upon settlement, will be presumed to have been rightfully allowed.....*Ibid.*
12. *Pleading.—Answer.—Code.*—Under our code, a defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off, whether legal or equitable, as he may have, without regard to the location of the subject-matter. *Vail et al. v. Jones et al.*.....467
13. *Same.—Mortgage.*—Suit on a note, in the circuit court of a certain county. Answer, that the note was given by the defendant to the plaintiff for money loaned by the latter to the former; that, to secure the payment thereof, the defendant executed to the plaintiff a deed, absolute on its face, but intended as a mortgage, for certain lands, of a value stated, in another county, in this State; that the plaintiff held possession of said real estate and refused to recon-

vey the same and give possession thereof on the payment of the note. *Held*, that the answer set forth a proper counter-claim, within the meaning of the code, and the court thereby became invested with jurisdiction of the subject-matter.....*Ibid.*

JUROR.

Competency of. See CRIMINAL LAW, 14.

JURY.

See CRIMINAL LAW, 32, 33, 36, 38; EVIDENCE, 9.

Right of to determine the law in criminal cases. See CRIMINAL LAW, 26.

Instructions to. See INSTRUCTIONS TO JURY.

JUSTICE OF THE PEACE.

See CRIMINAL LAW, 3; NAME; PLEADING, 11, 12.

JUSTIFICATION.

1. *Pleading.—Officer.*—An answer justifying an arrest made by the defendant as sheriff, by virtue of a *capias ad respondendum* issued from the office of the clerk of the court of common pleas, need not state that an affidavit was filed before the writ issued; but if the return day be past, the answer must show a return. *Caldwell v. Kenworthy et al.* 238
2. *Same.*—Where a defendant justifies the seizure and detention of property as a constable, by virtue of an execution in his hands, the original execution or a copy thereof must be filed with his answer. *Bridges v. Layman et al.*.....384
3. *Evidence.*—The justification cannot be sustained without proper evidence of the contents of the execution.....*Ibid.*
4. *Arrest.—Military Order.—Evidence.*—A sergeant of volunteers in the army of the United States, in the last war, having received a written order from the proper military authorities to arrest certain deserters, in this State, and any others of that class, and all persons who should interfere with such arrests, made the arrest of said deserters at night; and the party having them in charge,

under command of said sergeant, was fired upon from a wood, not far from the residence of one A., who was treasurer of a treasonable organization, the object of which was the protection of deserters, and who had been fined in the United States Court upon a plea of guilty to an indictment for harboring deserters. Upon the fire being returned, the assailants fled, and the soldiers, after proceeding a short distance, about three or four o'clock in the morning and before daylight, discovered A. crossing the road from the direction in which the firing had occurred, and halted and searched him, finding nothing but a part of a box of caps, though he subsequently stated that he dropped a revolver when he stopped. He seemed fatigued, and was "puffing and blowing." He was thereupon arrested and secured with ropes by the soldiers under command of said sergeant, and taken by them beyond the county, to the military headquarters of the district, where he was discharged by the provost marshal, after a short detention. Suit by A. for damages, against said sergeant and those under his command.

Held, that the written order for the arrest of the deserters having been shown to be lost, evidence of its contents was admissible.

Held, also, that the defendants were justified. *Teagarden v. Graham et al*422

L

LANDLORD AND TENANT.

See MISJOINDER.

1. *Statute of Frauds.—Parol Lease.—To Commence in Futuro.*—A parol lease of lands for the term of one year, to commence thirty days after the making of the contract, is valid within the Statute of Frauds; and the lessee may maintain an action against the lessor to recover possession according to the terms of the lease. *Huffman v. Starks*.....474
2. *Same.*—It seems that the parties to such a lease may have such remedies for violations of the contract as would appertain to violations of

other valid contracts. *Stackberger v. Mosteller*, 4 Ind. 461, questioned. *Ibid*.

LAW AND EQUITY.

See JURISDICTION, 12, 13; PRACTICE, 2, 3.

LEASE.

See LANDLORD AND TENANT, 1, 2.

LEGISLATURE.

See STATUTE.

LEVY.

See PRINCIPAL AND SURETY, 7.

LICENSE.

See CRIMINAL LAW, 2, 19, 20.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS

LIQUOR LAW.

See CRIMINAL LAW, 2, 19, 20.

M

MALICE.

See CRIMINAL LAW, 43, 44.

MALICIOUS PROSECUTION.

Pleading.—In a complaint for malicious prosecution, the plaintiff must aver that the prosecution claimed to have been malicious has terminated in his acquittal or discharge. *Gorrell v. Snow*.....215

MANSLAUGHTER.

1. *Malice.—Purpose to Kill.*—Although a person unlawfully and *purposely* kill a human being, yet if it be done in a sudden heat of passion, caused by a sufficient provocation, and in the absence of express malice, then malice will not be implied from the act, but the offense will be manslaughter. *Murphy v. The State*.511
2. *Provocation by Words.*—Words only, however abusive and insulting

- they may be, cannot constitute such sufficient provocation to rebut the presumption of malice arising from the act, in such a case, and reduce the offense from murder to manslaughter *Ibid.*
3. *Deadly Weapon*.—If the act be perpetrated with a deadly weapon, so used as likely to produce death, the purpose to kill may be inferred from the act. *Ibid.*
4. *Words*.—*Definition of*.—*Statute Construed*.—The word "voluntarily" in our statutory definition of manslaughter means, by the free exercise of the will, done by design, purposely. *Ibid.*
5. *Instruction to Jury*.—On the trial of an indictment for assault and battery with intent to murder, the court instructed the jury, in effect, that there can be no *purpose to kill* in manslaughter; and that if such a purpose be shown to exist, and if death result, the killing is murder. *Held*, that this was error. *Ibid.*

MARRIAGE.

Valuable consideration. See VOLUNTARY CONVEYANCE, 3.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See RAILROAD, 5, 11.

MEASURE OF DAMAGES.

See DAMAGES, 1, 2, 4; OFFICE AND OFFICER, 3, 4, 5.

MECHANIC'S LIEN.

1. *Notice*.—*Reformation of*.—A notice of intention to hold a material-man's lien erroneously described the property as lots "6 and 7," the true description being "3 and 4." Suit to enforce the lien, the complaint alleging, that the ownership of the property remained unchanged; that no third person had acquired any rights that would be affected by a correction of the mistake; and that the materials furnished were the only materials of the kind ever furnished by plaintiff to defendant.

Held, that the notice was insufficient to create the lien, and that the court had no power to reform it. *Lindley et al. v. Cross et ux*. 106

2. *Same*.—*Pleading*.—*Married Woman*.—A complaint to enforce a material-man's lien for lumber furnished to erect a dwelling house upon the separate real estate of a married woman, the portion relating to the lien showing an insufficient notice, was held bad on demurrer, for want of averment that the dwelling house was necessary and proper for a full and complete enjoyment by the married woman of the real estate in question. *Ibid.*

MERGER.

See TROOST v. DAVIS, 34.

MILITARY ORDER.

See ARREST.

MINOR.

See STATUTE OF LIMITATIONS, 1, 2.

MISJOINDER.

Of parties. See PARTIES, 10.

Of Causes.—*Demurrer*.—Complaint to recover the possession of certain real estate, held by the defendant as tenant of the plaintiff, for non-payment, upon ten days' notice, of rent due, and also for the rent unpaid, in one paragraph. Finding, that the plaintiff was not entitled to the possession of the premises, and that the defendant was indebted to the plaintiff in a certain sum. Judgment for the sum found due.

Held, that if two causes of action were improperly joined, the only method to reach that error was by demurrer. *Held*, also, that this court can in no case reverse a judgment for this error. *Burrows v. Holderman et al.* 412

MISREPRESENTATION.

See RESCISSION, 2, 3; SALE, 7, 8, 9, 11.

MISTAKE.

See WILL, 1, 2.

In notice of mechanic's lien. See MECHANIC'S LIEN, 1.

MORTGAGE.

See DESCENT, 6; HUSBAND AND WIFE 17; JURISDICTION, 12, 13.

1. *Code.—Law and Equity.—Subrogation.—Improvements.*—Where mortgaged real estate has been sold and conveyed by the mortgagor to the mortgagee or his assignee, there being a junior judgment-lien thereon, and the vendee of such purchaser, without actual notice of such judgment-lien, has expended money in valuable permanent improvements, without which the value of the property would not exceed the mortgage; though the judgment-plaintiff has a complete legal remedy to enforce his lien, by execution, yet, upon the application of such vendee, the execution-plaintiff will be required to exercise his legal right subject to the equitable right of the vendee, for whom the mortgage will be kept on foot, and to whom the value of the improvements will be allowed—the court, in taking account, charging the vendee with the value of the rents of the property, as it would have been without such improvements, for the time it has been held by him. *Troost v. Davis, Sheriff, et al.*.....34
2. *Jurisdiction.—Title to Real Estate.*—Where the main object of a complaint in the court of common pleas is to have satisfaction entered of a mortgage of real estate, there is no error in overruling a motion made by the defendant, before answer, to transfer the cause to the circuit court, on the ground that the title to real estate is in issue. *Paine et al. v. The Lake Erie & Louisville R. R. Co.*.....283
3. *Pleading.—Answer.—Costs.*—In a suit to enforce the entering of satisfaction of a mortgage, a party defendant against whom no relief is sought, but who is made a defendant merely to answer as to his pretended interest in the subject-matter of the suit, must file an affirmative answer if relief is sought by him. The general denial by such a party puts the plaintiff to such proof as will place

such defendant in the wrong. He may save himself from costs by disclaiming any interest.....*Ibid.*

MURDER.

See CRIMINAL LAW, 14, 15, 16, 28, 31, 36, 41, 43 to 47.

N

NAME.

See CORPORATION, 3.

Initial Letters.—Where a judgment is rendered before a justice of the peace against a defendant by a name in which an initial letter is used instead of his Christian name, the proceedings and judgment are thereby rendered irregular, but not void. *Bridges v. Layman et al.*.....384

NEGLIGENCE.

See RAILROAD, 5, 6, 9, 10, 11.

1. *Railroad.—Pleading.*—Where the owner of a quantity of cord-wood deposits the same at a certain place near a railroad track, in accordance with the direction of an agent of the railroad company and under an agreement with such agent by which it is to become the property of the railroad company when measured and paid for by the company, but until so measured and paid for to remain the property of such owner, and while so remaining his property it is consumed by fire originating from a locomotive engine in the use of the company and caused by the negligence of the employees of the company, and these facts are averred in the complaint in a suit by such owner against the company to recover the value of the wood; it is not necessary to allege also the destruction of the wood without the fault or negligence of the plaintiff. *The Indianapolis & Cin. R. R. Co. v. Paramore*.....143
2. *Same.—Burden of Proof.*—It is the duty of a railroad company to use machinery properly constructed with a view to prevent fire from being communicated to property lawfully placed by the owner thereof

- near the railroad track, and the engines should be operated with care and skill to the same end. If fire is communicated to such property from an engine by reason of a failure to use proper preventives, or by the carelessness of employees, the company is liable for the consequences; but negligence in either respect should not be inferred without proof, the burden of which rests on the party alleging it.....*Ibid.*
3. *Same.—Watchman.*—The railroad company is not bound to provide a watchman to protect property so placed by the owner, at his own instance, without any contract with the company, in danger of taking fire by unavoidable accident from the engines used by the company.....*Ibid.*
4. *Common Carrier.—Special Contract.* A common carrier cannot contract against liability for loss from his own ordinary negligence. Such a condition is void as against public policy. *The Indianapolis, Pittsburg, & Cleveland R. R. Co. v. Allen*.....394
5. *Same.*—A contract for the shipment of live stock by a railroad company provided, that, in consideration of a certain reduced rate of transportation, the owner of said stock should assume all risks of injuries which the animals or either of them might receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming and killing themselves or each other, or from delays, or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars of said company, or on account of being injured by the burning of hay, straw, or any other material used by the owner in feeding the stock, or otherwise, and any damage occasioned thereby, and also all risk of any loss or damage which might be sustained by reason of any delay, or from any other cause or thing in or incident to, or from, or in, the loading or unloading of said stock; that said owner should load and unload said stock at his own risk, the railroad company furnishing the necessary laborers to assist, under the direction and control of said owner, who should examine for himself all the means used in loading and unloading, to see that they were of sufficient strength, of the right kind, and in good repair and order; that each person riding free to take care and charge of said stock should do so at his own risk of personal injury from whatever cause; and that the owner should release and hold harmless, and keep indemnified, the railroad company, from all damages, actions, claims, and suits, on account of any and every injury, loss, and damage heretofore referred to, if any should occur or happen. Suit against the railroad company to recover for certain animals shipped by the plaintiff, under this contract, and lost, while in course of transportation, by escaping through a window open in the end of the car in which they had been loaded by the plaintiff's agent, who accompanied them on the route, and who, after the escape of one of the animals, told the conductor to fix said window, and the conductor not doing so, fixed it himself.
- Held*, that the railroad company was liable for the loss.....*Ibid.*
6. *Railroad.—Injury to Passenger.*—A railroad train ran beyond the platform for landing passengers at a certain station, and stopped over a culvert, and the proper servants of the railroad company announced the name of the station, as a notification to the passengers for that station that the train was there; whereupon a passenger for that station, who had paid the company the fare demanded of him, relying on the good faith of the company, alighted upon and into said culvert, without his fault or negligence, supposing he was alighting upon said platform, it being at night and so dark that he could not see that the train had not stopped at said platform; whereby he was greatly injured.
- Held*, that the company was liable for the injury so received. *The Columbus and Indianapolis Central Railway Co. v. Farrell*.....408
7. *Same.*—A railroad company is not legally responsible for the action of

persons not its servants in falsely announcing the arrival of a train at a station, whereby a passenger in attempting to alight from the train is injured.....*Ibid.*

NEW PARTY.

See PRACTICE, 16, 17, 18.

NEW TRIAL.

See WITNESS, 2.

1. *As of Right*.—The form of the issues in an action to quiet title to real property cannot abridge the right of the losing party to have a new trial on the payment of costs as provided by section 601 of the code. *Moor v. Seaton*.....11
2. *Same*.—In a suit to quiet title to real property, there was a finding for the defendant upon a cross complaint.
Held, that the plaintiff was entitled to a new trial on the payment of costs.....*Ibid.*
3. *Weight of Evidence*.—Where there is a conflict in the testimony, this court will not reverse a judgment on the weight of the evidence. *McCaw et al. v. Burk et al.*.....56
4. *Supreme Court*.—*Preponderance of Evidence*.—Where the Supreme Court finds evidence to support the finding, it will not go beyond this to determine the preponderance of the evidence. *Kinney v. Blythe*.....140
5. *Assignment of Errors*.—Where, in an assignment of errors, the only errors complained of relate to matters occurring on the trial for which a new trial was prayed, but the action of the court in overruling the motion is not assigned for error, no question is properly raised in this court. *Lingerman et al. v. Nave*.....222
6. *Excessive Damages*.—The assignment of excessive damages as a cause in a motion for a new trial is the only method by which that question can be raised. *City of Indianapolis v. Parker, Sheriff*.....230
7. *As of Right*.—There is no error in overruling a motion for a new trial as of right in an action of ejectment, where no proof is presented to the court that the costs have been paid. *McSheely v. Bentley*.....235

8. *Motion for New Trial*.—*Filing of Affidavits*.—Motion for new trial on the ground of misconduct of the jury. Affidavits in support, though ready, the party making the motion refused to put on file or submit to the inspection of the opposing counsel before the motion was taken up for argument, though he was previously notified in open court that objection would be made to the reading of them unless they were so filed. The court refused, therefore, to allow them to be read.

Held, that in this there was no error. *Hubble v. Osborn*.....249

9. *Same*.—*Finding Beyond the Issue*.—*Motion for Judgment on Finding*.—On the trial, in the circuit court, of an action commenced before a justice of the peace, to recover upon a stock subscription, the execution of the instrument not being denied by the defendant under oath, the court found specially for the plaintiff every point in issue, so that judgment could have been rendered for the instalment sued for, but found further, that after the defendant had executed the instrument it had been altered in a material part, without his knowledge or authority, and, over a motion by the plaintiff for a new trial, rendered judgment, without further objection, for the defendant.

Held, that the motion for a new trial did not raise any question; but a motion for judgment on the finding should have been made, in order to present the question involved to the circuit court.

Held, also, that the question could not be made for the first time in the Supreme Court. *The Fishback and Elizabethtown Gravel Road Co. v. Wilson*.....371

NOLLE PROSEQUI.

County Clerk.—*Fees where Nolle Prosequi is Entered*.—A county is not liable to its clerk for fees taxed by him for services rendered in a criminal prosecution disposed of by a *nolle prosequi* being entered. *Board of Com'rs of Morgan Co. v. Johnson*.....463

NOTE.

See PROMISSORY NOTE.

NOTICE.

See RAILROAD, 11.

Of mechanic's lien, reformation of. See
MECHANIC'S LIEN, 1.

NUISANCE.

1. *Injunction.—Obstructing Highway.*—A private person cannot enjoin the obstruction of a public highway without showing a special and peculiar injury to himself, not common to the public. The fact that the injury to such person is greater in degree than that to others does not entitle him to such relief. The injury may be to more than one person, but must not embrace the entire public. *McCowan et al. v. Whitesides*.....235
2. *Same.*—In a complaint to enjoin the obstructing of a public highway, the only averments connecting the plaintiffs with the highway were, "that it is their usual, convenient, and necessary route of travel from their houses, which are all on, or in the vicinity of, the road, to their market town and usual place of business; and that without greater or less circuitry, when the road is so obstructed, they and each of them have no other means, nor have the public wishing to use the road, of going to and fro, as they have a right to do, for business, comfort, and pleasure."
Held, that the complaint was bad on demurrer*Ibid*.

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OBSTRUCTION OF HIGHWAY.

See HIGHWAY, 1, 2; CRIMINAL LAW, 3;
NUISANCE, 1, 2.

OBTAINING GOODS BY FALSE
PRETENSE.

See CRIMINAL LAW, 11, 48 to 54.

OBTAINING SIGNATURE BY
FALSE PRETENSE.

See CRIMINAL LAW, 48 to 54.

OFFICE AND OFFICER.

See JUSTIFICATION, 1, 2, 3.

1. *County Clerk.—Deputy.—Compensation of.*—A county clerk may contract with his deputy that the latter for his compensation shall have a certain share of the fees taxed and collectable in the clerk's office during his deputyship. *Cheek et al. v. Tilley*121
2. *Injunction.—Receiver.*—In a suit by such deputy against his principal to recover the former's share of such fees, an injunction may be granted, pending the cause, restraining the clerk from collecting or transferring such fees yet unpaid, and the sheriff from paying such fees collected by him to the clerk; and a receiver may be appointed.....*Ibid*.
3. *Vacancy.—County Auditor.—Statute Construed.*—Where a vacancy in the office of county auditor is filled by appointment, and a successor is elected at the next general election, such successor is entitled, by section 4 of the act of May 13th, 1852 (1 G. & H. 671), to take the office as soon after his election as he shall have qualified. *Douglass v. The State, ex rel. Wright*.....429
4. *Usurpation.—Damages.—Measure of.*—If such appointee refuses to surrender the office upon the demand of such qualified successor, the latter is entitled to recover from the former the gross emoluments of the office received by him while so unlawfully withholding the office.*Ibid*.
5. *Same.*—At the October election, 1863, A. was elected auditor of a certain county, was commissioned, and, having duly qualified, went into said office November 1st, 1863. He resigned in December, 1866, and B. was appointed by the board of county commissioners to fill the vacancy. At the October election, 1867, C. was elected to fill the office, and was subsequently commissioned for four years from the 1st of November, 1867; and, having duly qualified, on the 11th of November, 1867, he demanded of B. possession of the office, its records, &c., which B. refused to surrender, claiming the right to hold till the first Monday of March, 1868. Information under the statute,

on the relation of C. against B., pending which, on the first Monday of March, 1868, B. surrendered to C. *Held*, that C. was entitled to the office when he so demanded possession of it, and to receive its fees and emoluments from that date.

Held, also, that B. was not entitled to retain from the gross emoluments of the office for the time he so unlawfully held it against C. the amount paid out for necessary clerk hire for discharging the duties of the office for that period.

Held, also, that section 1 of the act of May 31st, 1852 (1 G. & H. 122), so far as it fixed the commencement of the county auditor's term of office on the first Monday of March next ensuing his election, was intended to apply to a regular succession of terms by election, and was repealed, by implication, by the act of March 3d, 1855 (Acts 1855, p. 52), providing, that the term of office of the auditor and certain other officers "shall commence on the first Monday of the month of November, immediately following the general October elections, and that any of the above named officers to be elected hereafter shall hold their offices until the first Monday of November aforesaid, according to their respective terms."

Held, also, that, in such a case as this, said act of March 3d, 1855, is not in conflict with section 2 of article 6 of the State Constitution. *Howard v. The State*, 10 Ind. 99, explained. *Ibid*.

OFFICIAL BOND.

See ESTOPPEL, 2 to 5; PRINCIPAL AND AGENT, 1.

ONUS PROBANDI.

See INSANITY, 4; NEGLIGENCE, 2; TRUST, 8; VOLUNTARY CONVEYANCE, 2.

OVERRULED CASES.

See CASES OVERRULED, AFFIRMED, &C.

P

PARENT AND CHILD.

See VOLUNTARY CONVEYANCE, 2, 3.

PARTIES.

See CONSIDERATION, 1; CONTRACT, 8; CORPORATION, 1.

1. Promissory Note.—Party Plaintiff.

It is not necessary that the plaintiff in a suit upon a promissory note should be the legal owner thereof;—it is sufficient if he be the equitable owner. *Compton v. Davidson et al* 62

2. *Decedents' Estates*.—The heirs at law of a decedent against whose estate it appears there exists any debts cannot maintain an action for money due the estate. *Walpole's Adm. v. Bishop et al*.....156

3. *Same*.—Suit by the heirs at law of A. against the administrator of B., to recover money collected by B. in his lifetime, as attorney of A. The complaint alleged, that, in the same year that A. died, an administrator of his estate was appointed, who six years afterwards resigned his trust; that no assets ever came to his hands; that no claims against A.'s estate were ever filed in court; that no other administrator of A.'s estate was ever appointed; that the widow of A. paid all the claims that were presented or that she knew existed against his estate, and fully administered the same years before.

Held, that these plaintiffs could not maintain the action.....*Ibid*.

4. *Plaintiff—Agent*.—One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under the code, sue on such contract in his own name. (Code, secs. 3, 4.) *Rawlings v. Fuller*.....255

5. *Practice—Admission of New Party*.—Complaint on a note and mortgage, the plaintiffs claiming to be the surviving partners of a late firm named. Before any further pleadings had been filed, another person filed a petition, alleging, that he was a member of said late firm to which the note in suit was payable, and as such had an interest; and praying to be made a party plaintiff; and the court so ordered.

Held, the facts alleged in the petition being undisputed, that there was no

- error in this ruling. *Aylesworth et al. v. Brown et al.*.....270
6. *Same.—Pleading.—Amendment.*—An amendment of the complaint, so as to show the facts alleged in such petition, could properly have been made, only after the court had authorized the new party to come in.....*Ibid.*
7. *Same.*—The new party, having been admitted, over the defendant's objection, upon such petition, which was signed by his attorney and the attorney of the other plaintiffs, was, without formal amendment of the complaint, treated thenceforth throughout the case as a party plaintiff, without further objection.
- Held*, that, under the circumstances, such petition might, on appeal to this court, be regarded as an amendment to the complaint.....*Ibid.*
8. *Same.—Dismissal.—Disclaimer.*—One of the original plaintiffs was allowed to dismiss the suit as to himself without filing a disclaimer.
- Held*, that it was his right to do so.*Ibid.*
9. *Practice.—Capacity to Sue.*—A demurrer for the statutory cause of want of legal capacity to sue has reference to some legal disability of the plaintiff, such as infancy, idiocy, or coverture, and not to the fact that the complaint upon its face fails to show a right of action in the plaintiff. *Debolt v. Carter et al.*.....355
10. *Same.—Plaintiffs.—Misjoinder of.*—Where two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, the proper mode of taking advantage of the defect is by demurrer to the complaint, because it does not state facts sufficient to constitute a cause of action; and the defect can only be cured by striking out the name of the plaintiff improperly joined, or by so amending the complaint as to show a right of action in all the parties.....*Ibid.*
11. *Same.—Obstruction of Highway.—Injunction.*—In an action to enjoin the obstruction of a public highway within the limits of an incorporated town and under the jurisdiction and control of such corporation, brought by a plaintiff who predicates his right to such relief on the ground that he is the owner of

- certain lots fronting upon the highway obstructed, such corporation is not a necessary party plaintiff..*Ibid.*
12. *Defect of.—Demurrer.*—Answer by way of set-off, alleging, "that before the commencement of this action the plaintiff was, and still is, indebted to the defendant on an account before that time assigned to him in writing by" a third person named but not made a party; copies of the account and assignment being filed therewith.
- Held*, that the answer was bad on demurrer, expressed in the statutory form, for a defect of parties defendants. *Allen v. Jerauld*.....372

PARTITION OF LANDS.

See HUSBAND AND WIFE, 2.

1. *Widow.—Statute Construed.*—Where in an action for partition there are several tracts of land in which a widow is entitled to an estate for life or in fee simple, and there are tenants in common with her in all or any part of such lands, the act of March 5, 1859 (2 G. & H. 361), does not give her the absolute right to have her interest in several tracts located in a body, selected by her, on one of them, but confers on the commissioners acting under the direction of the court the power, where she has made such selection, to set over to her the tract so selected, if they deem it just and proper to do so. The tenants in common in the several tracts, in lieu of her interest in which she makes such selection, must be the same, and each one's interest must bear the same relative proportion in each tract to the interests of the other tenants. *Hanlon v. Waterbury*.....168
2. *Same.—Estoppel.—Vendor and Purchaser.*—An administrator, under an order of court granted upon a proper petition in which it was stated that the decedent left a widow surviving him, sold a certain lot, being one of two tracts of land of which the decedent was seized in fee simple at his death, for the payment of the debts of the decedent. After the payment of the debts, the widow, with knowledge of all the facts, received the residue of the proceeds

of the sale, as a part of the three hundred dollars to which she was entitled, under the statute, as against heirs and creditors.

Held, that the widow was not estopped from claiming her share, as against creditors, of the real estate so sold.

Held, also, that the purchaser at such sale, or his vendee, could not claim to be a purchaser in good faith, believing he was acquiring an unincumbered title to the whole lot.

Held, also, that the widow's entire interest, as against creditors, in all her husband's real estate could not be assigned to her in one body, upon her selection, from the other unsold tract, in which she as widow was tenant in common with the children and heirs at law of her husband. *Ibid*.

PARTNERSHIP.

See HUSBAND AND WIFE, 13; PARTIES, 5, 6, 7; PLEADING, 13.

Statute of Frauds.—Verbal Contract.

A partnership liability may become an individual debt against one member of the firm, by contract, not in writing, between the partners, with the consent of the creditor. *Hopkins v. Carr*.....260

PARTY-WALL.

Contract.—Construction of.—A. purchased of B. a portion of a certain lot, a part of the consideration, as shown by a written agreement between said parties, being, that A. promised to build thereon, within a short time, a first class three-story brick building; and it was agreed that one of the walls of the building should be a party-wall, each owning one moiety thereof and giving an equal amount of the ground; and that "whenever B. or his heirs or assigns use said wall by erecting a building on the lot adjoining on the said A.'s, B. or his heirs or assigns putting the joists of their building in said wall, then said A. or his heirs or assigns is to receive one-half of the actual cost of the building of said wall from B. or his heirs or assigns." A. complied with his contract by erecting a three-story brick building, leaving joist-holes. B. erected a two-story brick

building, capable of lasting many years, using the party-wall as one of the walls of his building, but did not insert his joists therein.

Held, in a suit by A. against B. upon the written agreement, to recover one half the cost of the party-wall, that the use of the wall was the thing contracted for, and that putting the joists into it was only an incident. *Greenwald v. Kappes*.216 ✓

PASSENGER.

Injury to. See RAILROAD, 16, 17.

PATENT RIGHT.

See CONSIDERATION, 5.

PENALTY.

See DAMAGES, 1, 2.

PHYSICIAN.

See WITNESS, 6.

PLEADING.

See CONSIDERATION, 5; CONTRACT, 12; DEED, 1, 3; HIGHWAY, 1; HUSBAND AND WIFE, 10; INJUNCTION, 2; JUSTIFICATION, 2; MISJOINDER; NEGLIGENCE, 1; PARTIES, 5, 6, 7; RAILROAD, 5; TRUST, 6.

See EPPLY v. MOWBR, 239.

1. *General Denial.*—The answer of general denial, under the code, merely puts in issue such of the averments of the complaint as the plaintiff is bound to prove in order to maintain his action; it does not controvert redundant allegations. *The Adams Express Co. v. Darnell*.20
2. *Promissory Note.—Bastardy.*—It is not a good defense to a suit upon a promissory note given in compromise of a prosecution against the maker for bastardy, "that it was understood that if the child should be born too soon, or the circumstances would not make out a case of bastardy, the note was to be delivered up, and that the child was born eight months from the time the defendant first met the prosecuting witness;" nor is it a good answer, "that the defendant has since learned

- that he could prove he was not the father, but could not make such proof at the date of the compromise." *Compton v. Davidson et al.*..... 62
3. *Written Instrument*.—Where a defense is founded upon a written agreement, the instrument should be set out.....*Ibid.*
4. *Decedents' Estates*.—*Promissory Note*.—*Abatement*.—Where the assignee of a promissory note, to whom it has been indorsed in blank by the payee, dies, intestate, and, there being no administration upon his estate, his widow, the note not having been made her property, assigns and indorses it in blank, and, the intestate having been largely indebted at the time of his death, his debts remain unpaid; or where, in addition to these facts, the maker holds a claim against the estate of the decedent, which in a suit by his administrator would be a proper set-off; in an action against the maker by one to whom the assignee of the widow has indorsed the note in blank, upon the note as if indorsed by the payee to the plaintiff, an answer, verified by affidavit, setting forth these facts and praying that the suit abate, is good on demurrer. *Stebbins v. Goldthwait et al.*.....159
5. *Same*.—*General Denial*.—An answer of general denial not sworn to would not, under our code, put the plaintiff upon proof of the genuineness of the indorsement as shown by the complaint, or admit evidence of the facts set up in such answer in abatement*Ibid.*
6. *Erroneous Judgment*.—*Judgment taken through Mistake, &c.*—Application in the form of a complaint, to correct an order directing the distribution of an estate, on the grounds that the order was erroneous, and that the plaintiff's attorney misunderstood the action of the court and, being absent when the order was read, took no exception. *Held*, that the complaint, though it appeared therefrom that the action of the court was erroneous, was bad on demurrer. *Dunham v. Tappan et al.*.....173
7. *Malicious Prosecution*.—In a complaint for malicious prosecution, the plaintiff must aver that the prosecution claimed to have been malicious has terminated in his acquittal or discharge. *Gorrell v. Snow*.....215
8. *Complaint*.—*Promise*.—*Guardian and Ward*.—A complaint against a guardian, to recover for maintaining and providing for his ward, did not contain any averment of a request or promise made by the defendant, or any allegation that he had failed to provide, within the means in his hands as guardian, for the reasonable wants of his ward. *Held*, that the complaint was bad on demurrer for want of sufficient facts. *Gwaltney, Guard., v. Cannon*.....227
9. *Justification*.—*Officer*.—An answer justifying an arrest made by the defendant as sheriff, by virtue of a *capias ad respondendum* issued from the office of the clerk of the court of common pleas, need not state that an affidavit was filed before the writ issued; but if the return day be past, the answer must show a return. *Caldwell v. Kenworthy et al.*238
10. *Consideration*.—Suit on a note against the maker. Answer, that the defendant received no consideration for the note. *Held*, that the answer was bad on demurrer. *Anderson v. Meeker*.....245
11. *Justice of the Peace*.—The strict rules of pleading are not applicable to proceedings before a justice of the peace. *Stewart v. Hutchins*.....252
12. *Same*.—*Warranty*.—*Demand of Judgment*.—Suit before a justice of the peace on a note for \$125. Answer, waiving the statutory denial and averring, that the note was given in part payment for a mare sold by plaintiff to defendant; that at the time of the sale plaintiff represented and warranted the mare as sound, when, in truth, she was unsound to such an extent that she died in consequence thereof in a short time; that plaintiff well knew she was unsound, and, designing to cheat and defraud defendant, warranted her to be sound; that defendant, relying on the representations and warranty of plaintiff, purchased her of plaintiff, and, as part payment, gave the note in suit, and for no other consideration whatever; that, in addition to the note, defendant paid plaintiff \$40 in money for the mare, and was at great expense in

- keeping and caring for her, whereby he was damaged \$25; and he claimed judgment for \$75, and all other proper relief.
- Held*, on motion by plaintiff for judgment notwithstanding a verdict for defendant, that the answer covered the note in suit and demanded judgment for \$75 over and above the same.....*Ibid.*
13. *Code*.—In a suit by surviving partners on a note payable to the firm, it was not shown in the body of the complaint what persons composed the late firm or how the right of action accrued to the plaintiffs as surviving partners, but these things were alleged in naming the parties plaintiffs.
- Held*, that such a method of stating facts, though not to be commended, is sufficient under the code. *Aylesworth et al. v. Brown et al.*.....270
14. *Answer*.—*Costs*.—In a suit to enforce the entering of satisfaction of a mortgage, a defendant against whom no relief is sought, but who is made a defendant merely to answer as to his pretended interest in the subject matter of the suit, must file an affirmative answer if relief is sought by him. The general denial by such a party puts the plaintiff to such proof as will place such defendant in the wrong. He may save himself from costs by disclaiming any interest. *Paine et al. v. The Lake Erie & Louisville R. R. Co.* 283
15. *Statute*.—*Corporation*.—Where a statute of another State constitutes a part of the organization of a corporation suing in this State, it is not necessary to its introduction in evidence by the plaintiff that it should have been pleaded.....*Ibid.*
16. *Parties*.—*Capacity to Sue*.—A demurrer for the statutory cause of want of legal capacity to sue has reference to some legal disability of the plaintiff, such as infancy, idiocy, or coverture, and not to the fact that the complaint upon its face fails to show a right of action in the plaintiff. *Debolt v. Carter et al.*.....355
17. *Same*.—*Plaintiffs*.—*Misjoinder of*.—Where two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, the proper mode of taking advantage of the defect is by demurrer to the complaint, because it does not state facts sufficient to constitute a cause of action; and the defect can only be cured by striking out the name of the plaintiff improperly joined, or by so amending the complaint as to show a right of action in all the parties.....*Ibid.*
18. *Another Action Pending*.—Suit by the owner or certain town lots, denying the existence of a highway upon and along a portion thereof, as claimed by the defendant, and seeking to quiet the plaintiff's possession of the lots, freed from the claim of such highway, praying a perpetual injunction against the defendant restraining him from disturbing the plaintiff's possession or asserting an easement over the lots as a public highway. After answer and reply, the defendant filed a cross complaint asserting the existence of an easement as a public highway over a part of said lots, charging the plaintiff with having unlawfully obstructed it, to the special injury of the defendant, and praying that the plaintiff be perpetually enjoined from repeating or continuing such obstruction.
- Held*, that the cross complaint was not bad on demurrer on the ground that another action was pending between the same parties for the same cause, to wit, the original complaint, the answer, and the reply.....*Ibid.*
19. *Parties*.—*Defect of*.—*Demurrer*.—Answer by way of set-off, alleging, "that before the commencement of this action the plaintiff was, and still is, indebted to the defendant on an account before that time assigned to him in writing by" a third person named, but not made a party; copies of the account and assignment being filed therewith.
- Held*, that the answer was bad on demurrer, expressed in the statutory form, for a defect of parties defendants. *Allen v. Jerauld*.....372
20. *Jurisdiction*.—In pleading a record of a judgment, it is unnecessary to show by averments that the court had jurisdiction. *Spaulding et al. v. Baldwin*.....376
21. *Same*.—*Exhibits*.—Where, in an action to recover possession of real estate, the defendant claims title

- through a sale and conveyance to him under an order of court granted upon the application of an administrator, to make assets to pay debts of the decedent, the answer need not aver that a real estate bond was filed, but copies of the record and the deed must be exhibited as parts of the answer.....*Ibid.*
22. *Will.—Probate of.*—A complaint seeking probate of an alleged will, averring that the defendant pretended that such a will as was described and of which a copy was set out was not duly executed, did not allege that defendant had the custody of the will, nor did the plaintiff offer to produce it.
- Held*, that the complaint was bad on demurrer. *Duckworth et al. v. Matlock et al.*.....380
23. *Demand of Judgment.*—A complaint upon a note alleged the promise of the defendant by his promissory note to pay the plaintiff a certain sum mentioned, and demanded judgment "for said sum and interest."
- Held*, that the demand of judgment was sufficiently definite. *Eaton et al. v. Burns et al.*.....390
24. *Same.—General Prayer.*—A complaint upon a note executed by two makers averred, that one of the makers had died since the execution of the note, and his administrator was named and made a defendant with the other maker, and judgment was "claimed also of the assets of said deceased in the hands of said administrator, and plaintiffs pray for general relief."
- Held*, that though the claim against the assets might not be in form, yet the general prayer included all proper relief.....*Ibid.*
25. *Promissory Note.—Vendor and Purchaser.—Incumbrance.*—Suit by A., the assignee, against B., the maker, upon a note, which by its terms was to be paid when B., using due diligence, should collect another certain note given by C. to D., the payee of the note in suit, and assigned by D. to B., the complaint alleging, that the defendant had collected said note on C. Answer in three paragraphs: 1. Admitting the execution of the obligation sued on, but denying that the defendant had collected the C. note. 2. That the husband of the payee of the note in suit was indebted to the defendant in a certain sum mentioned; that the note on C. was given to the defendant in payment of said indebtedness, and the obligation in suit was given for the residue of said note on C. in excess of said indebtedness; that at the maturity of C.'s note he paid thereon to the defendant a sum mentioned, being a certain amount in excess of said indebtedness; that before the commencement of this suit defendant tendered to plaintiff said excess, being less than the note in suit, which plaintiff refused to accept; and that defendant had ever since been ready, &c. 3. That the C. note was given in part consideration for a tract of land sold and conveyed to C. by D. by warranty deed; that D. derived her title to the land from her husband, without consideration; that a judgment rendered in the United States District Court against her said husband became a lien on said land while said husband was seized thereof; that C., after maturity of his note, tendered to the defendant, in full payment thereof, a receipt for the balance due on said judgment, from the clerk of said court, and also a tax receipt from the treasurer of the proper county which was filed as a part of the answer; that the residue of the C. note was fully paid to the defendant at maturity; that upon receiving said receipts and said residue, defendant tendered to plaintiff the full amount of the obligation in suit, less the amount of said receipts, which plaintiff refused to accept; and that defendant has ever since been ready, &c.
- Held*, that the second paragraph, for failing to deny that C. had paid the whole sum due on his note before the commencement of this action, was bad on demurrer.
- Held*, also, that the third paragraph, for not averring that the balance of the judgment in the District Court was paid by C., was bad on demurrer; and if regarded as an argumentative denial of the allegation of the complaint, that the defendant had collected the C. note, it might have been stricken out on motion,

- but the proper result having been attained by demurrer, there was no available error. *Picken et al. v. Whisler*.....402
26. *Answer.—Jurisdiction.—Code.*—Under our code, a defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off, whether legal or equitable, as he may have, without regard to the location of the subject-matter. *Vail et al. v. Jones et al.*.....467
27. *Same.—Mortgage.*—Suit on a note, in the circuit court of a certain county. Answer, that the note was given by the defendant to the plaintiff for money loaned by the latter to the former; that, to secure the payment thereof, the defendant executed to the plaintiff a deed, absolute on its face, but intended as a mortgage, for certain lands, of a value stated, in another county, in this State; that the plaintiff held possession of said real estate and refused to reconvey the same and give possession thereof on the payment of the note. *Held*, that the answer set forth a proper counter-claim, within the meaning of the code, and the court thereby became invested with jurisdiction of the subject-matter.....*Ibid.*
- POSSESSION.
- See VOLUNTARY CONVEYANCE, 3.
- PRACTICE.
- See CONTRACT, 8; DIVORCE; FUGITIVE FROM JUSTICE; INJUNCTION, 3; NEW TRIAL; PRINCIPAL AND SURETY, 7; VERDICT; WITNESS, 1, 2.
- Abstract of record.* See *DOHERTY v. McWORKMAN*, 383.
1. *Appeal from Interlocutory Order.* In a suit by an administrator to subject real estate to sale for the payment of the debts of the decedent, an appeal to the Supreme Court from the interlocutory order of sale was taken, an appeal bond, approved by the court, being filed and the appeal prayed at the term at which the order was made. *Held*, that the appeal was authorized by the code (section 576), and taken in accordance with its provisions (section 577). *Simpson et al. v. Pearson, Admr.*.....1
2. *Code.—Law and Equity.*—Under our code, the same protection to equitable rights may be invoked against a party seeking to enforce a right under a legal form as if such party were proceeding under equity forms. *Troost v. Davis, Sheriff, et al.*.....34
3. *Same.—Mortgage.—Subrogation.—Improvements.*—Where mortgaged real estate has been sold and conveyed by the mortgagor to the mortgagee or his assignee, there being a junior judgment-lien thereon, and the vendee of such purchaser, without actual notice of such judgment-lien, has expended money in valuable permanent improvements, without which the value of the property would not exceed the mortgage; though the judgment-plaintiff has a complete legal remedy to enforce his lien, by execution, yet, upon the application of such vendee, the execution-plaintiff will be required to exercise his legal right subject to the equitable right of the vendee, for whom the mortgage will be kept on foot, and to whom the value of the improvements will be allowed—the court, in taking account, charging the vendee with the value of the rents of the property, as it would have been without such improvements, for the time it has been held by him....*Ibid.*
4. *Supreme Court.—Weight of Evidence.*—Where there is a conflict in the testimony, this court will not reverse a judgment on the weight of the evidence. *McCaw et al. v. Burk et al.*.....56
5. *Fraud.—Resulting Trust.—Complete Remedy.*—Where a conveyance of real estate, for a valuable consideration, is made to one person, the consideration being paid by another, for the purpose of defrauding the creditors of the latter, such a creditor may, under the code, have a complete remedy in one action: a judgment may be obtained against the debtor and the real estate in question subjected to the payment of the judgment. *Lindley et al. v. Cross et ux.*.....106
6. *Supreme Court.—Preponderance of Evidence.*—Where the Supreme Court

- finds evidence to support the finding, it will not go beyond this to determine the preponderance of the evidence. *Kinney v. Blythe*.....140
7. *Supreme Court*.—This court will not, ordinarily, reverse a correct judgment merely because the court below may have acted upon a bad reason. *The Ohio & Mississippi R. R. Co. v. Shultz*.....150
8. *Erroneous Judgment*.—*Judgment Taken Through Mistake, &c.*—Application in the form of a complaint, to correct an order directing the distribution of an estate, on the grounds that the order was erroneous and that the plaintiff's attorney misunderstood the action of the court and, being absent when the order was read, took no exception. *Held*, that the complaint, though it appeared therefrom that the action of the court was erroneous, was bad on demurreur. *Dunham v. Tappan et al.*.....173
9. *Criminal Law*.—*Motion in Arrest*. A variance between the affidavit and the information cannot be taken advantage of by motion in arrest. *Morris v. The State*.....189
10. *Supreme Court*.—*New Trial*.—*Assignment of Errors*.—Where, in an assignment of errors, the only errors complained of relate to matters occurring on the trial for which a new trial was prayed, but the action of the court in overruling the motion is not assigned for error, no question is properly raised in this court. *Lingerman et al. v. Nave*.222
11. *Instruction to Jury*.—There is no error in refusing to give to the jury an instruction asked by a party which is not pertinent to the issues. *Hagee et al. v. Grossman*.....223
12. *Assignment of Errors*.—*Criminal Law*.—In the assignment of errors on an appeal by the defendant in a criminal action, the only errors assigned were, that the finding was contrary to law, and to the evidence given on the trial. *Held*, that no question was properly presented for the decision of this court. *Cavanaugh v. The State*.229
13. *Motion for New Trial*.—*Filing of Affidavits*.—Motion for a new trial on the ground of misconduct of the jury. Affidavits in support, though ready, the party making the motion refused to put on file or submit to the inspection of the opposing counsel before the motion was taken up for argument, though he was previously notified in open court that objection would be made to the reading of them unless they were so filed. The court refused, therefore, to allow them to be read. *Held*, that in this there was no error. *Hubble v. Osborn*.....249
14. *Supreme Court*.—*Abstracts*.—The evidence, although it be made a part of the record, if not abstracted as required by rule tenth of this court, will not be examined. *Hopkins v. Carr*.....260
15. *Amicus Curie*.—A motion to dismiss a suit on account of alleged defects in the complaint cannot properly be made by an *amicus curie*. *Piggott v. Kirkpatrick*.....261
16. *Admission of New Party*.—Complaint on a note and mortgage, the plaintiffs claiming to be the surviving partners of a late firm named. Before any further pleadings had been filed, another person filed a petition, alleging, that he was a member of said late firm to which the note in suit was payable, and as such had an interest, and praying to be made a party plaintiff; and the court so ordered. *Held*, the facts alleged in the petition being undisputed, that there was no error in this ruling. *Aylesworth et al. v. Brown et al.*.....270
17. *Same*.—*Pleading*.—*Amendment*.—An amendment of the complaint, so as to show the facts alleged in such petition, could properly have been made, only after the court had authorized the new party to come in.....*Ibid.*
18. *Same*.—The new party, having been admitted, over the defendant's objection, upon such petition, which was signed by his attorney and the attorney of the other plaintiffs, was, without formal amendment of the complaint, treated thenceforth throughout the case as a party plaintiff, without further objection. *Held*, that, under the circumstances, such petition might, on appeal to this court, be regarded as an amendment to the complaint.....*Ibid.*
19. *Dismissal*.—*Disclaimer*.—One of the original plaintiffs was allowed

- to dismiss the suit as to himself without filing a disclaimer.
Held, that it was his right to do so. *Ibid*.
20. *Interrogatories.—Harmless Error.*—Where the defendant filed, with his answer, interrogatories to the plaintiff, which were answered, but the answers were not sufficient, and the court erroneously refused to compel him to answer, but it appeared by the record that the plaintiff was sworn as a witness, and as such testified fully to the facts sought to be elicited by the interrogatories, fully supporting, in that respect, the averments of the answer;
Held, that the error could not avail the defendant *Ibid*.
21. *Statement of Evidence to Jury.—Bill of Exceptions.*—The statement of the evidence which a party is allowed to make to the jury by section 324 of the code is, as to its brevity or prolixity, a matter to be left, to a considerable extent, to the control of the court trying the cause; and where the interference of the court is complained of on appeal, the bill of exceptions must show the statement that was being made when the court interposed. *Ibid*.
22. *Supreme Court.*—The Supreme Court is not bound to express an opinion upon decisions of the lower courts which obviously result in no harm *Ibid*.
23. *Witness.—Character.—Remarks of Court Before Jury.*—A cross interrogatory was put to a witness which had been already twice propounded and answered; and the court, upon objection made, refused to allow a third answer, remarking, in the hearing of the jury, that "when a witness of his standing and character had answered a question twice, it was sufficient."
Held, that, under the circumstances of the case, there was no error. *Ibid*.
24. *Parties.—Capacity to Sue.*—A demurrer for the statutory cause of want of legal capacity to sue has reference to some legal disability of the plaintiff, such as infancy, idiocy, or coverture, and not to the fact that the complaint upon its face fails to show a right of action in the plaintiff. *Debolt v. Carter et al.* 355
25. *Same.—Plaintiffs.—Misjoinder of.* Where two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, the proper mode of taking advantage of the defect is by demurrer to the complaint, because it does not state facts sufficient to constitute a cause of action; and the defect can only be cured by striking out the name of the plaintiff improperly joined, or by so amending the complaint as to show a right of action in all the parties. *Ibid*.
26. *Same.—Obstruction of Highway.—Injunction.*—In an action to enjoin the obstruction of a public highway within the limits of an incorporated town and under the jurisdiction and control of such corporation, brought by a plaintiff who predicates his right to such relief on the ground that he is the owner of certain lots fronting upon the highway obstructed, such corporation is not a necessary party plaintiff. *Ibid*.
27. *Another Action Pending.*—Suit by the owner of certain town lots, denying the existence of a highway upon and along a portion thereof, as claimed by the defendant and seeking to quiet the plaintiff's possession of the lots, freed from the claim of such highway, praying a perpetual injunction against the defendant restraining him from disturbing the plaintiff's possession or asserting an easement over the lots as a public highway. After answer and reply, the defendant filed a cross complaint, asserting the existence of an easement as a public highway over a part of said lots, charging the plaintiff with having unlawfully obstructed it, to the special injury of the defendant, and praying that the plaintiff be perpetually enjoined from repeating or continuing such obstruction.
Held, that the cross complaint was not bad on demurrer on the ground that another action was pending between the same parties for the same cause, to wit, the original complaint, the answer, and the reply. *Ibid*.
28. *Finding Beyond the Issue.—Motion for Judgment on the Finding.*—On the trial, in the circuit court, of an action commenced before a justice of the peace, to recover upon a stock subscription, the execution of

- the instrument not being denied by the defendant under oath, the court found specially for the plaintiff every point in issue, so that judgment could have been rendered for the instalment sued for, but found further, that, after the defendant had executed the instrument it had been altered in a material part, without his knowledge or authority, and, over a motion by the plaintiff for a new trial, rendered judgment, without further objection, for the defendant.
- Held*, that the motion for a new trial did not raise any question; but a motion for judgment on the finding should have been made, in order to present the question involved to the circuit court.
- Held*, also, that the question could not be made for the first time in the Supreme Court. *The Fishback and Elizabethtown Gravel Road Co. v. Wilson*.....371
29. *Replevin.—Affidavit*.—In an action of replevin in the court of common pleas, the affidavit of the plaintiff for delivery of the property to him did not state, whether or not it had been seized under an attachment against his property.
- Held*, that the affidavit was bad. *Bridges v. Layman et al.*.....384
30. *Record.—Interrogatories.—Rejected Pleadings*.—Interrogatories filed by a party to an action, and the answers thereto by the opposite party, and paragraphs of answer to the complaint which are rejected by the court on motion, are not parts of the record if not made so by bill of exceptions. *Klingensmith et al. v. Reed*.....389
21. *Supreme Court.—Judgment.—Form of*.—No question can be made in the Supreme Court as to the form of a judgment where no objection has been taken below. *Eaton et al. v. Burns et al.*.....390
32. *Supreme Court.—Credibility of Witness*.—Where, upon appeal to the Supreme Court, the question is one of credibility of witnesses solely, the action of the lower court will stand. *The Columbus & Indianapolis Central Railway Co. v. Farrell*...408
33. *Demurrer.—Misjoinder of Causes*. Complaint to recover the possession of certain real estate held by the defendant as tenant of the plaintiff, for non-payment, upon ten days' notice, of rent due, and also for the rent unpaid, in one paragraph. Finding, that the plaintiff was not entitled to the possession of the premises, and that the defendant was indebted to the plaintiff in a certain sum. Judgment for the sum found due.
- Held*, that if two causes of action were improperly joined, the only method to reach that error was by demurrer.
- Held*, also, that this court can in no case reverse a judgment for this error. *Burrows v. Holderman et al.*.....412
- PRESUMPTION.
- See* CRIMINAL LAW, 35, 36, 37, 43, 44, 45, 49; TRUST, 8; VOLUNTARY CONVEYANCE, 2.
- Use of deadly weapon. See* CRIMINAL LAW, 28, 41, 45.
- PRINCIPAL AND AGENT.
- See* ESTOPPEL, 3; HUSBAND AND WIFE, 12, 20; PARTIES, 4; SALE, 7.
1. *Official Bond*.—The principal obligor in a county treasurer's official bond is not the agent of the board of county commissioners in procuring its execution. *The State, ex rel. McCarty v. Pepper et al.*.....76
2. *Declarations*.—As steps in proving the authority of one as an agent in the transaction in controversy, evidence of his similar transactions with different persons and of his declarations therein was held admissible. *Morehead v. Murray et al.*.....418
- PRINCIPAL AND SURETY.
1. *Extension of Time.—Contract*.—An oral agreement by the payee of a promissory note with the principal maker, without the knowledge or consent of the surety, whose suretyship is known to the payee, to extend the time of payment during a definite period beyond the maturity of the paper, is valid, and releases the surety, if founded upon a sufficient consideration. *Pierce v. Goldsberry*.....52
2. *Same.—Consideration.—Interest*.—The oral agreement of the principal

- debtor to pay merely the same interest that the note would have borne if the indulgence had been given voluntarily, is a sufficient consideration for such a promise of forbearance.....*Ibid.*
3. *Estoppel.—Bond.*—When a bond has been signed and delivered to the principal obligor by a surety, upon the condition that others, not named in the instrument, shall sign before it is delivered to the obligee, and it is delivered without such signatures being obtained, and received by the obligee without notice of such condition or circumstances which should put him upon inquiry, the condition imposed will not avail the surety. This is not a question of the power of the principal to deliver the bond in its apparently perfect condition, but simply a question of estoppel. *The State, ex rel. McCarty, &c., v. Pepper et al.*.....76
4. *Same.—Blanks.*—A surety signing and delivering to the principal obligor a bond before the names of the sureties have been inserted in the body of the instrument will be held as agreeing that the blank for such names may be filled after he has executed it.....*Ibid.*
5. *Same.—Signing After Forged Signature.*—A surety signed a county treasurer's official bond, at the request of the principal obligor, after the signatures of other sureties, without reading it, or hearing it read, or asking what it was, upon being told by the principal that it was a county paper.
Held, that such surety was not released by the fact that one of the signatures before his was forged.....*Ibid.*
6. *Agency.—Official Bond.*—The principal obligor in a county treasurer's official bond is not the agent of the board of county commissioners in procuring its execution.....*Ibid.*
7. *Co-Surety.—Alteration of Writing.* A promissory note payable to and at a certain bank was signed by A. and B., the former being the maker, the latter his surety, and delivered by A., for a valuable consideration, to C., who for the purpose of having it discounted for his benefit at said bank, it having been prepared by A. and B. with that expectation, signed the note as maker, without the knowledge or consent of B., upon the requirement of the officers of the bank, but with the express agreement with said officers that he did so as surety or guarantor to the bank for both the other makers, and not as joint surety with B. After maturity, the bank sued A., B., and C. upon the note; C. was "not found;" and judgment was rendered against A. and B. by default, upon their failure to appear. C. paid the bank the amount of the judgment, under a promise by the bank to assign it to him.
Held, that the signing by C. was not such an alteration of the note as rendered it void as to B.
Held, also, that C. was not a co-surety with B.
Held, also, that C. was entitled to execution for his benefit on said judgment against A. and B., and, A. having become insolvent, such execution was properly levied for the whole amount thereof upon the property of B. *Bowser et al. v. Rendell*.....128

PROBATE COURT.

See JURISDICTION, 7, 8, 10.

PROCEEDING SUPPLEMENTARY TO EXECUTION.

See EPLLY v. MOWREY, 239.

PROCESS.

See PRACTICE, 3; *PRINCIPAL AND SURETY*, 7.

PROFITS.

See DAMAGES, 4.

Of wife's separate property. *See HUSBAND AND WIFE*, 4, 15.

1. *Railroad.—Directors.—Fraud.*—Persons who are directors of a railroad company cannot acquire such an interest in the profits of a contract for the construction of the road as to give them a standing in a court of equity to interpose an objection to the consummation of a compromise between the railroad company and its contractor. *Paine et al. v. The Lake Erie & Louisville R. R. Co.*.....283

2. *Same*.—*Stockholders*.—An arrangement made by persons who are directors of a railroad company with a contractor, by which such persons are to share in the profits of the contract for the construction of the road, can only be confirmed by the stockholders, and not by the directors of whom the guilty persons form a part.....*Ibid*.

PROMISE.

See RESCISSION, 4.

PROMISSORY NOTE.

See ARBITRATION AND AWARD, 1; CONSIDERATION, 2 to 5; HUSBAND AND WIFE, 12; PLEADING, 23, 24, 25; PRINCIPAL AND SURETY, 1, 2.

1. *Pleading*.—*Bastardy*.—It is not a good defense to a suit upon a promissory note given in compromise of a prosecution against the maker for bastardy, "that it was understood that if the child should be born too soon, or the circumstances would not make out a case of bastardy, the note was to be delivered up, and that the child was born eight months from the time the defendant first met the prosecuting witness;" nor is it a good answer, "that the defendant has since learned that he could prove he was not the father, but could not make such proof at the date of the compromise." *Compton v. Davidson et al*.....62
2. *Party Plaintiff*.—It is not necessary that the plaintiff in a suit upon a promissory note should be the legal owner thereof;—it is sufficient if he is the equitable owner.....*Ibid*.
3. *Principal and Surety*.—*Co-Surety*.—*Alteration of Writing*.—A promissory note payable to and at a certain bank was signed by A. and B., the former being the maker and the latter his surety, and delivered by A., for a valuable consideration, to C., who, for the purpose of having it discounted for his benefit at said bank, it having been prepared by A. and B. with that expectation, signed the note as maker, without the knowledge or consent of B., upon the requirement of the officers of the bank, but with the express agree-

ment with said officers that he did so as surety or guarantor to the bank for both the other makers, and not as joint surety with B. After maturity the bank sued A. B., and C. upon the note; C. was "not found;" and judgment was rendered against A. and B. by default, upon their failure to appear. C. paid the bank the amount of the judgment under the promise by the bank to assign it to him.

Held, that the signing by C. was not such an alteration of the note as rendered it void as to B.

Held, also, that C. was not a co-surety with B.

Held, also, that C. was entitled to execution for his benefit on said judgment against A. and B., and, A. having become insolvent, such execution was properly levied for the whole amount thereof upon the property of B. *Bowser et al. v. Rendell*.....128

4. *Pleading*.—*Abatement*.—*Decedents' Estates*.—Where the assignee of a promissory note, to whom it has been indorsed in blank by the payee, dies, intestate, and, there being no administration upon his estate, his widow, the note not having been made her property, assigns and indorses it in blank, and, the intestate having been largely indebted at the time of his death, his debts remain unpaid; or where, in addition to these facts, the maker holds a claim against the estate of the decedent, which in a suit by his administrator would be a proper set-off; in an action against the maker by one to whom the assignee of the widow has indorsed the note in blank, upon the note as if indorsed by the payee to the plaintiff, an answer, verified by affidavit, setting forth these facts and praying that the suit abate is good on demurrer. *Stebbins v. Goldthwait et al*.....159

5. *Same*.—*General Denial*.—An answer of general denial not sworn to would not, under our code, put the plaintiff upon proof of the genuineness of the indorsement as shown by the complaint, or admit evidence of the facts set up in such answer in abatement.....*Ibid*.

6. *Corporation*.—*Party Plaintiff*.—A

note made payable to the treasurer of what purports to be a corporation, without giving the name of the treasurer, is, in effect, payable to the corporation, and shows that the corporation is the party in interest; and a suit on the note is properly brought in the name of the corporation. *McBroom v. The Corporation of Lebanon*.....268

PROVISION.

For wife. See VOLUNTARY CONVEYANCE, 2.

R

RAILROAD.

See COMMON CARRIER, 5, 6.

1. *Fences*.—Where a railroad passes upon an embankment erected in the bed of a canal, such embankment must be guarded by fences. *The White Water Valley R. R. Co. v. Quick*127
2. *Negligence*.—*Pleading*.—Where the owner of a quantity of cord-wood deposits the same at a certain place near a railroad track, in accordance with the direction of an agent of the railroad company and under an agreement with such agent by which it is to become the property of the railroad company when measured and paid for by the company, but until so measured and paid for to remain the property of such owner, and while so remaining his property it is consumed by fire originating from a locomotive engine in the use of the company and caused by the negligence of the employees of the company, and these facts are averred in the complaint in a suit by such owner against the company to recover the value of the wood; it is not necessary to allege also the destruction of the wood without the fault or negligence of the plaintiff. *The Indianapolis & Cin. R. R. Co. v. Paramore*.....143
3. *Same*.—*Burden of Proof*.—It is the duty of a railroad company to use machinery properly constructed with a view to prevent fire from being communicated to property lawfully placed by the owner thereof

near the railroad track, and the engines should be operated with care and skill to the same end. If fire is communicated to such property from an engine by reason of a failure to use proper preventives, or by the carelessness of employees, the company is liable for the consequences; but negligence in either respect should not be inferred without proof, the burden of which rests on the party alleging it.....*Ibid.*

4. *Same*.—*Watchman*.—The railroad company is not bound to provide a watchman to protect property so placed by the owner, at his own instance, without any contract with the company, in danger of taking fire by unavoidable accident from the engines used by the company.....*Ibid.*
5. *Negligence*.—*Liability for Injury to Employee*.—Suit by an administrator, for the benefit of the children and heirs at law of the deceased, against a railroad company, the complaint alleging, that the decedent had been in the employment of the defendant as fireman on a freight engine for about two months, when, on a day mentioned, he was ordered by defendant to serve as fireman on a particular engine attached to an express passenger train, then running on said road between certain points named; that said engine "was old and rickety, with a weak, defective, patched up, and leaky boiler," which was not strong enough to endure a high pressure of steam, and could not be used with safety in drawing a train of any kind, and that its use to an express train, in its weak and unsafe condition, involved great peril to the lives of the passengers and employees; that the deceased did not know, and had no means of knowing, the weak and unsafe condition of said engine when he was placed upon it as fireman; that defendant, with full knowledge of the defective and unsafe condition thereof, carelessly and negligently caused the same to be used in drawing said express train; that on the same day the boiler exploded, by reason of its defective and unsound condition, and caused the death of the decedent, without any negligence or fault on his part.

Held, that the complaint was good on demurrer. *Columbus & I. C. Railway Co. v. Arnold, Adm'r*.....174

6. *Same.—Master and Servant.*—An employer or master is not liable, in the absence of an express contract to that effect, for injuries suffered by one of his employees solely through the carelessness or negligence of another employee of the same master, engaged in the same general business. Nor is the master rendered liable by the fact that the employee receiving the injury is inferior in grade of employment to the one by whose negligence the injury is caused, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end. *Gillewater v. The M. & I. R. R. Co.*, 5 Ind. 339, and *Fitzpatrick v. The N. A. & S. R. R. Co.*, 7. Ind 436, disapproved.....*Ibid.*

7. *Board of Directors.*—The board of directors of a railroad company are its immediate representatives and occupy the relation of master to the various employees engaged in operating the road and superintending and performing the business of the company in its various departments.....*Ibid.*

8. *Master-Machinist.*—A master-machinist who has the immediate charge, control, and direction, of the engines and other machinery of a railroad company, and the repairs thereof, and the control and direction of the engineers and firemen on the trains, is a fellow-servant of such a fireman.....*Ibid.*

9. *Responsibility to Employee.*—The principle of *respondet superior* does not apply as between a railroad company and its employees, and the company can only be held responsible to the employee injured without his own fault, while in the discharge of his duty, where the injury is caused by the negligence or failure of the board of directors to perform some duty devolved upon them by express contract with the employee, or which is implied from their relation of master to the employee.*Ibid.*

10. *Same.—Implied Duties.*—It is the duty of a railroad corporation to use every reasonable care in the

proper construction of its road, in supplying it with the necessary equipment, including properly constructed engines, and the necessary and proper materials for its repair, and in the selection of competent, skilful, and trusty subordinates to supervise, inspect, repair, and regulate the machinery, and to regulate and control the operations of the road. If these duties are performed with care and diligence by the directors, and one of the persons so employed is guilty of negligence, by which an injury occurs to another employee, it is not the negligence of the directors, or master, and the company is not responsible.....*Ibid.*

11. *Same.—Notice.*—Where the directors have performed these duties, and have placed the engines of the company under the immediate charge, control, and direction of a competent and trustworthy master-machinist, and have furnished him with adequate materials and resources for their repair, notice to the directors that an engine is out of repair and unsafe for use is not, in the absence of notice that is being so used, sufficient to render the company liable for an injury to a fireman employed by the company, while in the performance of his duty upon such engine under the direction of the master-machinist, caused by the explosion of the boiler, by reason of its defective condition, without his fault or negligence or the fault or negligence of the engineer in charge.....*Ibid.*

12. *Injury to Animals.—Fences.*—Where an animal was killed by the cars of a railroad company at a point where the road was securely fenced to within ten feet, on one side of the track, and within twenty steps on the other, of a public crossing, "but the fences did not extend to the cattle-guard at the public crossing; if they did it would stop the cattle from going on the track;"

Held, that the company was not relieved from liability by the fact that the road was securely fenced at the point where the animal was killed. *The Jeff., Mad., & Ind'polis R. R. Co. v. Avery*277

13. *Consolidated Companies.*—A railroad company formed by the consolidation of two companies succeeds to all the rights of each of the corporations of which it is composed, and may compromise and settle a claim against one of them, and sustain an action to enforce the settlement. *Paine et al. v. The Lake Erie & Louisville R. R. Co.*.....283
14. *Directors.*—*Fraud.*—Persons who are directors of a railroad company cannot acquire such an interest in the profits of a contract for the construction of the road as to give them a standing in a court of equity to interpose an objection to the consummation of a compromise between the railroad company and its contractor*Ibid.*
15. *Same.*—*Stockholders.*—An arrangement made by persons who are directors of a railroad company with a contractor, by which such persons are to share in the profits of the contract for the construction of the road, can only be confirmed by the stockholders, and not by the directors of whom the guilty persons form a part.....*Ibid.*
16. *Negligence.*—*Injury to Passenger.*—A railroad train ran beyond the platform for landing passengers at a certain station, and stopped over a culvert, and the proper servants of the railroad company announced the name of the station, as a notification to the passengers for that station that the train was there; whereupon a passenger for that station, who had paid the company the fare demanded of him, relying on the good faith of the company, alighted upon and into said culvert, without his fault or negligence, supposing he was alighting upon said platform, it being at night and so dark that he could not see that the train had not stopped at said platform; whereby he was greatly injured. *Held*, that the company was liable for the injury so received. *The Columbus and Indianapolis Central Railway Co. v. Farrell*.....408
17. *Same.*—A railroad company is not legally responsible for the action of persons not its servants in falsely announcing the arrival of a train at a station, whereby a passenger in

attempting to alight from the train is injured.....*Ibid.*

RAPE.

See WITNESS, 2.

RATIFICATION.

See RAILROAD, 14, 15.

REAL PROPERTY.

Action to quiet title. *See* NEW TRIAL, 1, 2.

Action for possession. *See* VOLUNTARY CONVEYANCE, 3; EJECTMENT, 1; MISJOINDER, 1; STATUTE OF FRAUDS, 2, 3. *Title to involved.* *See* JURISDICTION, 2.

REASONABLE DOUBT.

See INSANITY, 4.

1. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt as to the guilt of the accused—that is, unless he is so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests, under circumstances where there was no compulsion resting upon him to act at all. *Arnold v. The State*, 23 Ind. 170, explained. *Bradley v. The State*492
2. *Same.*—On the trial of an indictment for murder in the first degree, the court instructed the jury, in effect, that if the evidence satisfied them of the guilt of the defendant with such certainty that a prudent man would feel safe in acting upon such conviction in his own important affairs, then, in such case, there would be no reasonable doubt of the defendant's guilt. *Held*, that this test was too narrow.....*Ibid.*

RECEIVER.

See INJUNCTION, 1.

RECORD.

See BILL OF EXCEPTIONS, 1, 2; PRACTICE, 30.

REDEMPTION.

See SCHOOL LANDS.

REFEREE.

See CONSIDERATION, 6.

RELATION.

See INDIAN TREATY.

RELEASE.

See CONTRACT, 8, 9, 10.

Of surety. See PRINCIPAL AND SURETY,
1, 2.

Joint Debtors.—A. held a judgment against B. and C. for a certain amount; B. paid half the amount, and thereupon A. executed to him a written instrument wherein A. covenanted that he would thenceforth "pursue the legal and equitable remedy on said judgment against C. alone, and not against B., looking to C. alone for the full and final payment and satisfaction of said judgment, without, however, intending to prejudice or interfere with the rights and liabilities of said B. and C. to each other on account of said judgment."

Held, that this instrument did not operate as a release of C. from liability upon the judgment. *Aylesworth et al. v. Brown et al.*.....270

REMEDY.

See INTEREST, 3.

RENT.

See LANDLORD AND TENANT; MISJOINDER; MORTGAGE, 1.

RENTS AND PROFITS.

See HUSBAND AND WIFE, 4, 15.

REPEAL OF LAWS.

1. *Inchoate Rights.*—Inchoate rights generally, derived from a statute, are lost by its repeal, unless saved by express words in the repealing statute. *Moor v. Seaton*.....11
2. *Same.*—*Redemption.—School Lands.* A purchaser of school lands having

made default in the payment of interest on purchase money, the lands were resold. By the law in force at the time of his purchase, a defaulting purchaser had a right to redeem within one year after sale; by that in force at the time of the resale and at the time of the default, a delinquent purchaser could redeem at any time before sale, but not after. *Held*, that the right to redeem was governed by the latter law.....*Ibid.*

REPLEVIN.

See HUSBAND AND WIFE, 14.

1. *Affidavit.*—In an action of replevin in the court of common pleas, the affidavit of the plaintiff for delivery of the property to him did not state whether or not it had been seized under an attachment against his property.

Held, that the affidavit was bad. *Bridges v. Layman et al.*.....384

2. *House Treated as Personalty.—Trust.*—A., being the owner of a certain town lot on which was a dwelling house, built another house adjoining the former and permanently attached thereto, but standing in a street of the town, though he supposed that it was upon a lot. Becoming financially embarrassed, he fled the country; and an execution was issued on a judgment which had been rendered against him in favor of B., by virtue of which the sheriff levied on and sold said house in the street as personal property, C. being in possession thereof at the time of the sale. Afterwards, the agent of B., who had bid off the property for B., informed C., that by B.'s direction he would let C. have the house for A. if C. would pay the amount it had been bid off at, and also pay said agent a small debt that A. owed him. C. thereupon wrote to A., stating the proposition made by said agent, and offering to furnish the money and buy the house for A.'s benefit. A. replied, advising C. to buy the property and sell it again, pay himself out of the proceeds, and apply the balance to the payment of A.'s debts. Subsequently, C., being the owner of the lot, purchased the

house of said agent, paying him therefor the amount the agent had bid for it and a certain sum for back rent, C. furnishing the money, which A. never refunded or offered to refund. C. continued to occupy the house, always claiming it as his own, till his death, when his sole heir sold the lot and the house in the street, by two separate and distinct sales, to D. Suit by A. against D. to recover possession of the house in the street as personal property, the above facts appearing in evidence, but there being no written evidence of title to the lot in C. or D.

Held, that, in the absence of a conveyance to C., in terms sufficiently comprehensive to cover the house as appurtenant to the lot, it was reasonable to presume that it was properly treated by the parties as personalty.

Held, also, that there was no trust in favor of A.

Held, also, that a subsisting indebtedness of C. to A. growing out of a partnership which had existed between them long prior to the purchase of the house by the former, could not be deemed a refunding by A. of the money paid by C. for the house. *Foy et al. v. Reddick*.....414

REPRESENTATIONS.

See PLEADING, 12; SALE.

RESCISSION.

1. *Sale*.—Suit by the buyer to rescind an executed contract for the sale of one-half of a portable mill.

Held, that an averment that the seller never intended that the buyer should derive any benefit from the mill, or exercise any control over it, could add no force to the complaint.

Held, also, that the fact that after the sale was completed the buyer was not permitted to collect money or examine the books, could not entitle him to rescind the contract. *Sieveling et al. v. Litzler*.....13

2. *Same*.—*Misrepresentation*.—*Value*. A misrepresentation by the seller as to the value of the article offered for sale is not available to rescind the contract; but where a fact is stated falsely which goes to make

up the value (as the number of feet of lumber a portable saw-mill can saw in a day), and which is peculiarly within the knowledge of the seller, upon the seller's statement of which the buyer can rely without negligence, the false statement may constitute a ground for rescission.....*Ibid*.

3. *Same*.—If the buyer relies upon a statement of the seller that the former will make a good and profitable trade by the purchase, it is the buyer's own folly.....*Ibid*.

4. *Same*.—*Promise*.—The failure of the seller to keep a mere promise, to be performed after the sale is complete, is not a ground for rescission.....*Ibid*.

5. *Same*.—*Fraud*.—*Diligence*.—The party claiming to rescind a contract of sale on account of fraud must act at once upon discovery of the fraud; and he cannot postpone discovery by neglect to use ordinary diligence. This rule must be strictly enforced where the law affords a complete remedy in damages.....*Ibid*.

6. *Same*.—*Injury*.—To authorize a rescission of a contract of sale on the ground of fraud, there must be an injury shown as the result of that fraud.....*Ibid*.

RESERVED QUESTION.

See STATE v. MORGAN, 66.

RESIDENCE.

See GUARDIAN AND WARD, 5.

RESPONDEAT SUPERIOR.

See RAILROAD, 9.

RESTRAINT OF TRADE.

See DAMAGES, 2.

RESULTING TRUST.

See TRUST.

RETAILING LIQUOR.

See CRIMINAL LAW, 2, 19 20.

RETURN.

See JUSTIFICATION, 1.

ROADS.

See HIGHWAY.

RULES OF COURT.

Supreme Court, abstracts. See DOHERTY v. McWORKMAN, 383.

1. *Change of Venue.—Circuit Court.* A rule of the circuit court requiring an application for a change of venue on account of local prejudice to be made at least one day before the day for which the cause is docketed for trial, is reasonable and within the express power of such court to adopt. *The Jeff., Mad., & Ind'polis R. R. Co. v. Avery.....277*
2. *Same.*—Where it is clearly made to appear that some act performed within the excluded time has excited such prejudice, or that such feeling already existing was undiscovered by reasonable effort, the case presents such special circumstances as to exclude the application of such rule intended for general convenience..... *Ibid.*

S

SABBATH.

See CRIMINAL LAW, 2, 9, 19, 20.

SALE.

See PLEADING, 12.

1. *Rescission.*—Suit by the buyer to rescind an executed contract for the sale of one-half of a portable mill. *Held*, that an averment that the seller never intended that the buyer should derive any benefit from the mill, or exercise any control over it, could add no force to the complaint. *Held*, also, that the fact that after the sale was completed the buyer was not permitted to collect money or examine the books, could not entitle him to rescind the contract. *Steeking et al. v. Litzler.....13*
2. *Same.—Misrepresentation.—Value.* A misrepresentation by the seller as to the value of the article offered for sale is not available to rescind the contract; but where a fact is stated falsely which goes to make up the val-

ue (as the number of feet of lumber a portable saw-mill can saw in a day), and which is peculiarly within the knowledge of the seller, upon the seller's statement of which the buyer can rely without negligence, the false statement may constitute a ground for rescission.....*Ibid.*

3. *Same.*—If the buyer relies upon a statement of the seller that the former will make a good and profitable trade by the purchase, it is the buyer's own folly.....*Ibid.*
4. *Same.—Promise.*—The failure of the seller to keep a mere promise, to be performed after the sale is complete, is not a ground for rescission.....*Ibid.*
5. *Same.—Fraud.—Diligence.*—The party claiming to rescind a contract of sale on account of fraud must act at once upon discovery of the fraud; and he cannot postpone discovery by neglect to use ordinary diligence. This rule must be strictly enforced where the law affords a complete remedy in damages.....*Ibid.*
6. *Same.—Injury.*—To authorize a rescission of a contract of sale on the ground of fraud, there must be an injury shown as the result of that fraud.....*Ibid.*
7. *Fraud.—Agent.*—On a sale of goods it was agreed that the buyer should give to the seller, in payment, upon delivery of the goods, notes of solvent persons. A certain note so given was not such as the contract thus called for, and the buyer, knowing this, fraudulently deceived the seller's agent, to whom he delivered the note, knowing him to be such agent and knowing that the proceeds of the sale were to go to, and become the property of, the agent, who, on discovering the deceit, offered to return the note to the buyer and demanded of him other good notes. There being evidence of these facts in a suit by the seller against the buyer, the plaintiff bringing the note into court and offering to return it to the defendant; there was a finding for the plaintiff in a certain sum, and that the defendant be entitled to withdraw the note from the files of the court and hold it as his own. *Held*, that the finding was correct. *Kinney v. Blythe.....140*

8. *Deceit*.—Where a seller of goods knowingly makes false representations to the buyer as to their quality, but the buyer does not rely upon such representations and is not deceived thereby, the seller is not liable in an action for deceit. *Hagee et al. v. Grossman*.....223
9. *Same*.—Where a seller has made false representations as to the quality of the goods, but the buyer, in making the purchase, relies on a test of their quality made by his own agent, who is not prevented by any act or word of the seller from testing the goods, the seller is not liable for deceit.....*Ibid.*
10. *Same*.—*Evidence*.—*Examination of Goods by Jury*.—Upon the trial of an action for deceit in the sale of a quantity of flour, its quality at the time of the sale being in question, the court refused to permit the flour to be examined by the jury, to test its odor.
Held, that it was properly excluded.....*Ibid.*
11. *Consideration*.—*Failure of*.—Suit on a note. Answer, that the defendant bought of the payee a certain number of fruit trees; that it was agreed by them that said trees should be in good condition, and that if any of them should not grow, the seller would replace them with other good trees; that on the day the note was given (in November), the seller delivered said trees, and represented them to be as provided for by said contract; that the defendant, not being experienced in the nursery business, believing the trees to be as represented, in consideration thereof, executed the note, and properly set out the trees; that the same were not in good condition, but were wilted, and in bad condition, and wholly worthless; that defendant did not and could not know their condition till long after the note was executed; that they did not grow, of which the seller had notice on the 1st day of the next June; yet he had wholly failed to replace them.
Held, that the answer was good on demurrer. *Morehead v. Murray et al.*.....418
12. *Same*.—*Evidence*.—The trees were delivered to the buyer upon his

written order directed to the seller, for certain trees at specified prices.

Held, that parol evidence was admissible to prove an agreement of the parties at the time of making said order, that the seller should replace any of the trees that might not grow.....*Ibid.*

SATISFACTION.

See MORTGAGE, 2, 3.

SCHOOL LANDS.

Redemption.—A purchaser of school lands having made default in the payment of interest on purchase money, the lands were resold. By the law in force at the time of his purchase, a defaulting purchaser had a right to redeem within one year after sale; by that in force at the time of the resale and at the time of the default, a delinquent purchaser could redeem at any time before sale, but not after.

Held, that the right to redeem was governed by the latter law. *Moor v. Seaton*.....11

SERVANT.

See RAILROAD, 5, to 11.

SET-OFF.

See PLEADING, 26.

SHERIFF.

See CITY, 1; JUSTIFICATION, 1.

SIGNATURE.

Obtaining by false pretense. See CRIMINAL LAW, 48 to 54.

SOLDIER.

See JUSTIFICATION, 4.

Statute of Limitations.—*Absence from the State on Public Business*.—*Volunteer Soldier*.—Absence from the State as a volunteer soldier or officer in the army of the United States constitutes absence on public business within the meaning of the stat-

ute which provides, that "the time during which the defendant is a non-resident of the State or absent on public business shall not be computed in any of the periods of limitation" (2 G. & H. 161, sec. 216). *Gregg v. Mallock*.....373

SPECIAL FINDING.

See PRACTICE, 28.

SPECIAL VERDICT.

See VERDICT.

SPIRITUOUS LIQUORS.

See CRIMINAL LAW, 2, 19, 20.

STATUTE.

See EVIDENCE, 10, 11.

Legislative Interpretation.—It is not ordinarily the function of the legislature to interpret statutes; nor is such interpretation binding upon the courts as to a past transaction, but as to matters occurring thereafter such legislation guides all the departments of the government. *Dequindre et al. v. Williams*.....444

STATUTE OF FRAUDS.

1. *Verbal Contract.—Partner.*—A partnership liability may become an individual debt against one member of the firm, by contract, not in writing, between the partners, with the consent of the creditor. *Hopkins v. Carr*.....260
2. *Parol Lease.—To Commence in Futuro.*—A parol lease of lands for the term of one year, to commence thirty days after the making of the contract, is valid within the Statute of Frauds; and the lessee may maintain an action against the lessor to recover possession according to the terms of the lease. *Huffman v. Starks*.....474
3. *Same.*—It seems that the parties to such a lease may have such remedies for violations of the contract as would appertain to violations of other valid contracts. *Stackberger v. Mosteller*, 4 Ind. 461, questioned. *Ibid.*

STATUTE OF LIMITATIONS.

1. *Reasonableness of Time.*—Where a right springs, not from a contract, but from legislative enactment, the action to enforce a claim under such enactment may be limited by law; and the legislature is the exclusive judge of the reasonableness of the time allowed within which the action may be brought. *DeMoss et al. v. Newton et al.*.....219
2. *Same.—Minors.*—No exception can be claimed in favor of minors, unless they are expressly mentioned by the statute as excepted.....*Ibid.*
3. *Same.—Descent.—Widow.*—A man died in 1854, seized in fee simple of certain real estate, leaving surviving him a widow and brothers and sisters, but no child, or father, or mother. The widow took possession of the entire property. Suit for partition, the plaintiffs claiming title to an undivided interest in the land as brothers and sisters of the deceased. *Held*, that it was a sufficient answer, that before the commencement of the action more than ninety days had elapsed from the 9th of March, 1867, when section 3 of the act of March 4th, 1853, (Acts 1853, p. 55), was repealed and such limitation fixed to the right of action under its provisions. (Acts 1867, p. 204)...*Ibid.*
4. *Absence from the State on Public Business.—Volunteer Soldier.*—Absence from the State as a volunteer soldier or officer in the army of the United States constitutes absence on public business within the meaning of the statute which provides, that "the time during which the defendant is a non-resident of the State or absent on public business shall not be computed in any of the periods of limitation" (2 G. & H. 161, sec. 216). *Gregg v. Mallock*.....373

STATUTES CONSTRUED.

See COURT OF COMMON PLEAS, 2; CRIMINAL LAW, 4, 5, 6, 9, 19; DESCENT, 4; ELECTION, 1; EVIDENCE, 9; FUGITIVE FROM JUSTICE, 1; NEW TRIAL, 1; OFFICE AND OFFICER, 3, 4, 5; PARTIES, 4; PARTITION OF LANDS, 1; PRACTICE, 1; TURNPIKE, 1.

1. *Trust.—Executed Use.*—Section 13, 1 G. & H. 652, applies where the trust is expressly declared and the beneficiary named in the conveyance, the title of the trustee being nominal only; in which case this statute executes the use. *Gaylord et al. v. Dodge*.....41
2. *Interest.—Rate of upon Judgment.* The act of 1867, increasing the maximum rate of interest to ten per cent., when that rate is provided for by contract in writing, does not affect the third section of the act of 1861, enacting, that "interest on a judgment, or decree for money, shall be from the date of signing until the same be satisfied, at the rate per cent. agreed upon by the parties in the original contract, *not exceeding six per cent.*, and if there was no contract by the parties as to interest, then at the rate of six dollars a year on one hundred dollars." *Smith v. Thomas*.....280
3. *Town—Vacation of Highway.*—The corporate limits of a certain town extended to and along the middle of a county road, thirty feet in width, located before the town was laid out.
Held, that the board of trustees of the town had not power under the ninth clause of section 22 of the act for the incorporation of towns, 1 G. & H. 624, to vacate so much of said highway as was within the corporate limits. *Debolt v. Carter et al.* 355
4. *Criminal Law.—Term of Imprisonment.*—Where a defendant was sentenced to an imprisonment in the county jail for ninety days, and until a fine of one dollar and the costs of the prosecution were paid or replevied;
Held, that when the imprisonment for the ninety days had been completed, that portion alone of the sentence was discharged, and there remained the imprisonment for the fine and costs—that the defendant was not entitled, under sec. 130, 2 G. & H., 421, to a credit of fifty cents per day upon the fine and costs from the date when his imprisonment commenced. *Ex Parte Tongate*.....370
5. *Manslaughter.—Words—Definition of.*—The word "voluntarily," in our statutory definition of manslaughter, means, by the free exercise of the

will, done by design, purposely.

- Murphy v. The State*.....511
6. *False Pretenses.*—The statute 2 G. & H. 445, sec. 27, does not require, as an element of the offense thereby defined, that the false representation should be made for the purpose of accomplishing the particular thing which does result. A false pretense such as would tend to produce the result accomplished, an obtaining thereby, and designedly, a thing of value from another, and an intention by the transaction to defraud that other, are the only elements of the offense. *Todd v. The State*.....514

STOCKHOLDERS.

See RAILROAD, 14, 15.

STOCK SUBSCRIPTION.

See PRACTICE, 28.

SUBROGATION.

See MORTGAGE, 1.

SUBSCRIBER.

Of petition to county com'rs for organization of turnpike company; estoppel.
See TURNPIKE, 4.

SUNDAY.

See CRIMINAL LAW, 2, 9, 19, 20.

SUPERVISOR.

See HIGHWAY, 3.

SUPREME COURT.

See PRACTICE.
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v. MCWOREMAN, 383.

SURETY.

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SURVIVORSHIP.

See HUSBAND AND WIFE, 1, 2.

T

TENANT.

See LANDLORD AND TENANT.

TENDER.

See PLEADING, 25.

TESTIMONY.

See PRACTICE, 4.

TIME.

Computation of.—Sheriff.—Custody of City Prisoners.—Where a city, having no prison in which to confine prisoners convicted before its court for violations of its ordinances, commits them to the custody of the keeper of the county prison, it seems that if a prisoner is so placed in the custody of such keeper a short time before midnight and discharged a short time after that hour, the city cannot properly be charged with two days' boarding therefor. *City of Indianapolis v. Parker, Sheriff*. 230

TOWN.

See HIGHWAY, 1, 2; PARTIES, 11.

Highway.—Vacation of.—The corporate limits of a certain town extended to and along the middle of a county road, thirty feet in width, located before the town was laid out. *Held*, that the board of trustees of the town had not power under the ninth clause of section 22 of the act for the incorporation of towns, 1 G. & H. 624, to vacate so much of said highway as was within the corporate limits. *Debolt v. Carter et al.*...355

TREASURER.

Of county. See ESTOPPEL, 5; PRINCIPAL AND AGENT, 1.

TREATY.

See INDIAN TREATY.

TRESPASS.

See CRIMINAL LAW, 5, 6.

TRUST.

See HUSBAND AND WIFE, 14.

1. *Widow.—Descent.*—A. purchased from

B. certain real estate, for which he paid in money and in other land in the conveyance of which to B. the wife of A. joined with her husband. At A.'s request and without the knowledge or consent of his wife, who supposed that the entire property so bought from B. was conveyed to her husband, a portion of it was conveyed by B., by deed absolute on its face, to C., a son of A. by a former marriage, and the deed was delivered by B. to A. Nothing of the transaction was known by C. till he received, in due course of mail, at his place of residence in another state, a letter written to him by A. on the day of the conveyance, informing him of the purchase and of the making of the deed to him as aforesaid, and that A. would want a deed from C., in a few days, to the children of E. and F., daughters of A. by said former marriage; that A. would send a deed for C. to sign in a few days; that the property was then in C.'s name, and that A. wished C. to tell the wife of the latter how it was situated then, so that she would know all about it if C. should be taken away; and if A. should, he wished the property so deeded to C. to be made over to said children, the rents and profits to be paid them yearly for their support, and when they should become twenty-one years old, "to have the property in fee simple, to be disposed of as they please;" that A. thought he had bought the B. property very low; that it cost B. a certain sum, "and as property is advancing, it must bring that again, but I shall not sell, as it is in a good location, and will let the children have it;" and requesting C. to not let any one know but that he (C.) had paid for half the B. property. C. immediately answered A. by letter, acknowledging the receipt of the letter from A., and saying that C. had told his wife about the arrangement A. proposed making in case C. should be taken away, and that she would follow the injunction of A.'s letter, in that event. C. and his said wife had no children. Subsequently, without consideration, at A.'s request, C. and his said wife conveyed said real estate to A. for

life, then in separate parcels, to E. and F. for life, remainders in fee simple to said children of E. and F. After the execution of the deed from B., A. made expensive improvements on the land so conveyed to C., collected rents, and paid taxes and assessments of all kinds. A. died, intestate, leaving his said wife and issue by her surviving him.

Held, that no use or trust resulted in favor of A. from said conveyance of B. to C., and that said letters did not create a trust in favor of A. or confer on him the right to the use, control, or disposition of the property conveyed to C., but that said letters did create a trust in favor of the children of E. and F. which a court of equity would have enforced.

Held, also, that the variation in the agreement between A. and C. did not affect the rights of A.'s surviving wife.

Held, also, that no interest in the real estate so conveyed to and by C. descended under the statute to the widow of A. *Gaylord et al. v. Dodge*.....41

2. *Executed Use.—Statute Construed.* Section 13, 1 G. & H. 652, applies where the trust is expressly declared and the beneficiary named in the conveyance, the title of the trustee being nominal only; in which case this statute executes the use....*Ibid.*

3. *Voluntary Conveyance.*—A deed of conveyance of real estate is good between the parties thereto without any consideration. *McCaw et al. v. Burk et al.*.....56

4. *Same.*—Where a husband voluntarily conveys real estate to his wife or a father to his child, no trust arises in his favor, but the presumption is that the conveyance is intended as a provision or advancement. This presumption is not conclusive. The *onus* of removing it is upon him who insists that a trust exists....*Ibid.*

5. *Same.—Marriage.*—The owner in fee of certain real estate conveyed the same in fee, his wife joining in the deed, to his brother, who, having received the title for such purpose, immediately conveyed in fee to the wife and minor daughter of the original grantor. Both deeds were voluntary, the former expressing a consideration in a certain sum,

the latter none. After the deeds were recorded, the daughter intermarried with one who had knowledge of the deeds and believed her to be the lawful owner of the land so conveyed to her. The daughter died, leaving one child, the only issue of such marriage; and the child died, leaving its father its sole heir at law.

Held, in a suit by the surviving father of such child for partition, the original grantor still retaining possession, that no trust resulted to such grantor under the deeds.

Held, also, that the marriage of the daughter made her a purchaser for a valuable consideration, and it would be a fraud upon her husband to withdraw the estate passed to her.

Held, also, that the plaintiff was entitled to possession of the land so conveyed to said daughter.....*Ibid.*

6. *Practice.—Fraud.—Resulting Trust.* Where a conveyance of real estate, for a valuable consideration, is made to one person, the consideration being paid by another, for the purpose of defrauding the creditors of the latter, such a creditor, may, under the code, have a complete remedy in one action: a judgment may be obtained against the debtor and the real estate in question subjected to the payment of the judgment. *Lindley et al. v. Cross et ux.*.....106

7. *Resulting Trust.—Number of Witnesses.*—Suit by A. against B. and C. for possession of certain real estate purchased by the plaintiff at sheriff's sale on an execution in favor of the plaintiff, issued upon a judgment against B., the legal title at the time of such sale standing in the name of C., to whom it had been conveyed by D. The plaintiff claimed that B. had paid the purchase-money, and, to defraud his creditors, particularly the plaintiff, to whom he was then largely indebted, procured the conveyance to be made by D. to C. It was claimed in defense, that in making the purchase B. acted as the authorized agent of C., who was not present, and that B. advanced the purchase-money in pursuance of an agreement with C. by which he was to so advance it as a short loan to C., who soon afterwards repaid the money. On the trial, B. testified to this

effect, and C. testified to the same facts, except as to the fact of the loan, concerning which the court refused to allow him to testify.

Held, that this refusal was error. *Hubble v. Osborn*.....249

8. *Same.—Fraud.—Presumption.*—In such suit the court instructed the jury, that if B. was indebted to plaintiff in a large sum at the date of the deed from D. to C., and B. contracted for and paid for said land out of his own moneys, and had the same conveyed by deed to C., "such conveyance is presumed fraudulent as against the plaintiff, and a trust results in favor of the plaintiff to the extent of his just demand, unless the fraudulent intent is disproved by the evidence before you."

Held, that the instruction was correct.....*Ibid.*

9. *Same.—Evidence.—Admissions.*—The admissions and declarations of the person paying the purchase-money, made after the conveyance to the other person, are not admissible in evidence against the latter.....*Ibid.*

10. *Parties.—Plaintiff.—Agent.*—One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under the code, sue on such contract in his own name. (Code, secs. 3, 4.) *Rawlings v. Fuller*.....255

11. *Replevin.—House Treated as Personality.*—A., being the owner of a certain town lot on which was a dwelling house, built another house adjoining the former and permanently attached thereto, but standing in a street of the town, though he supposed that it was upon a lot. Becoming financially embarrassed, he fled the country; and an execution was issued on a judgment which had been rendered against him in favor of B., by virtue of which the sheriff levied on and sold said house in the street as personal property, C. being in possession thereof at the time of the sale. Afterwards, the agent of B., who had bid off the property for B., informed C., that by B.'s direction he would let C. have the house for A. if C. would pay the amount it had been bid off at, and also pay said agent a small

debt that A. owed him. C. thereupon wrote to A., stating the proposition made by said agent, and offering to furnish the money and buy the house for A.'s benefit. A. replied, advising C. to buy the property and sell it again, pay himself out of the proceeds, and apply the balance to the payment of A.'s debts. Subsequently, C., being the owner of the lot, purchased the house of said agent, paying him therefor the amount the agent had bid for it and a certain sum for back rent, C. furnishing the money, which A. never refunded or offered to refund. C. continued to occupy the house, always claiming it as his own, till his death, when his sole heir sold the lot and the house in the street by two separate and distinct sales, to D. Suit by A. against D. to recover possession of the house in the street as personal property, the above facts appearing in evidence, but there being no written evidence of title to the lot in C. or D.

Held, that, in the absence of a conveyance to C., in terms sufficiently comprehensive to cover the house as appurtenant to the lot, it was reasonable to presume that it was properly treated by the parties as personalty.

Held, also, that there was no trust in favor of A.

Held, also, that a subsisting indebtedness of C. to A. growing out of a partnership which had existed between them long prior to the purchase of the house by the former, could not be deemed a refunding by A. of the money paid by C. for the house. *Foy et al. v. Reddick*.....414

TURNPIKE.

1. *Act of 1865.—Length of Road.*—A turnpike company organized under the act of March 6th, 1865, must make at least five miles of road; and this requirement is not fulfilled by supplying a deficiency by the acquisition, by purchase or otherwise, of a road already made. *Green, Treasurer, &c., et al. v. Beeson et al.*?

2. *Same.—County Commissioners.*—The Board of County Commissioners cannot relieve the company from this requirement, and any attempt to do so is a nullity.....*Ibid.*

3. *Same.*—*Injunction.*—If such a route is designated in its organization that less than five miles of road is to be made, the company has no power to do anything; and the collection of taxes for the construction of the road may be enjoined...*Ibid.*
4. *Same.*—*Estoppel.*—A signer of the petition to the County Commissioners for the organization of such a pretended corporation, who has not become a member of it, is not estopped from denying the legality of the organization in a suit to enjoin the collection of such taxes.....*Ibid.*

U

UN SOUND MIND.,

See CONTRCT, 4, 5; INSANITY.

USER.

Highway.—A county road was located by the board of county commissioners, in 1840, over certain lands, the location being defective for not specifying the width of the highway; but, in pursuance of the order of the commissioners, the supervisor of the proper road district opened and improved the road, thirty feet in width, as a public highway, and it was continuously thereafter kept, maintained, and used by the public as a public highway, in the same place and of the same width, with the knowledge and consent of the owners of said lands, for more than twenty years.

Held, that these facts showed the existence of a public highway by user. *Debolt v. Carter et al.*.....355

USURPATION.

See OFFICE AND OFFICER, 3, 4, 5.

USURY.

See INTEREST, 3.

V

VACANCY.

See COURT OF COMMON PLEAS, 2; OFFICE AND OFFICER, 3, 4, 5.

VARIANCE.

See CRIMINAL LAW, 10, 54.

VENDOR AND PURCHASER.

See CONSIDERATION, 2, 3; GUARDIAN AND WARD, 6, 7, 8; MORTGAGE, 1; PARTITION OF LANDS, 2; VOLUNTARY CONVEYANCE, 1, 2, 3.

1. *Descent.*—*Surviving Wife.*—*Mortgage.*—A man during marriage purchased certain land, which he entered upon and improved, and of which he received from his vendor a deed of conveyance in fee simple, which was lost, misplaced, or destroyed by the grantee, without having been recorded; and, with his consent, another deed was made to his son by said vendor. Afterwards the father and son executed a mortgage of the land, in which the wife of the former did not join. The father, son, and said wife resided as one family upon the land and cultivated it from the time of said purchase till the father and son died, leaving said wife surviving and said mortgage unpaid.

Held, that the surviving wife was entitled to one-third of the land in fee simple as against the mortgagee seeking to foreclose his mortgage. *Sutton v. Jervis*.....265

2. *Pleading.*—*Promissory Note.*—*Incumbrance.*—Suit by A., the assignee, against B., the maker, upon a note, which by its terms was to be paid when B., using due diligence, should collect another certain note given by C. to D., the payee of the note in suit, and assigned by D. to B., the complaint alleging, that the defendant had collected said note on C. Answer in three paragraphs: 1. Admitting the execution of the obligation sued on, but denying that the defendant had collected the C. note. 2. That the husband of the payee of the note in suit was indebted to the defendant in a certain sum mentioned; that the note on C. was given to the defendant in payment of said indebtedness, and the obligation in suit was given for the residue of said note on C. in excess of said indebtedness; that at the maturity of C.'s note he paid thereon to the defend-

ant a sum mentioned, being a certain amount in excess of said indebtedness; that before the commencement of this suit defendant tendered to plaintiff said excess, being less than the note in suit, which plaintiff refused to accept; and that defendant had ever since been ready, &c. 3. That the C. note was given in part consideration for a tract of land sold and conveyed to C. by D. by warranty deed; that D. derived her title to the land from her husband, without consideration; that a judgment rendered in the United States District Court against her said husband became a lien on said land while said husband was seized thereof; that C., after maturity of his note, tendered to the defendant, in full payment thereof, a receipt for the balance due on said judgment, from the clerk of said court, and also a tax receipt from the treasurer of the proper county which was filed as a part of the answer; that the residue of the C. note was fully paid to the defendant at maturity; that upon receiving said receipts and said residue, defendant tendered to plaintiff the full amount of the obligation in suit, less the amount of said receipts, which plaintiff refused to accept; and that defendant has ever since been ready, &c.

Held, that the second paragraph, for failing to deny that C. had paid the whole sum due on his note before the commencement of this action, was bad on demurrer.

Held, also, that the third paragraph, for not averring that the balance of the judgment in the District Court was paid by C., was bad on demurrer; and if regarded as an argumentative denial of the allegation of the complaint, that the defendant had collected the C. note, it might have been stricken out on motion, but the proper result having been attained by demurrer, there was no available error. *Picken et al. v. Whisler*.....402

VENUE.

See CRIMINAL LAW, 12, 13.

1. *Change of.—Rule of Court.*—A rule of the circuit court requiring an application for a change of venue

on account of local prejudice to be made at least one day before the day for which the cause is docketed for trial, is reasonable and within the express power of the court to adopt. *The Jeff., Mad., & Ind'polis R. R. Co. v. Avery*.....277

2. *Same.*—Where it is clearly made to appear, that some act performed within the excluded time has excited such prejudice, or that such feeling already existing was undiscovered by reasonable effort, the case presents such special circumstances as to exclude the application of such rule intended for general convenience..... *Ibid.*

3. *Criminal Law.—Evidence.*—If in a criminal case there be no evidence that the offense charged was committed within the jurisdiction of the court, there should be an acquittal. *Clem v. The State*.....480

VERDICT.

Special Verdict.—Interrogatories.—The court, of its own motion, required the jury, unconditionally, to answer certain interrogatories, which they answered without returning a general verdict.

Held, that the answers could stand as a special verdict. *Paine et al. v. The Lake Erie & Louisville R. R. Co.*.....283

VOID AND VOIDABLE.

See GUARDIAN AND WARD, 2; JURISDICTION, 4, 5; NAME.

VOLUNTARY CONVEYANCE.

1. A deed of conveyance of real estate is good between the parties thereto without any consideration. *McCaw et al. v. Burk et al.*.....56

2. *Trust.*—Where a husband voluntarily conveys real estate to his wife or a father to his child, no trust arises in his favor, but the presumption is that the conveyance is intended as a provision or advancement. This presumption is not conclusive. The *onus* of removing it is upon him who insists that a trust exists..... *Ibid.*

3. *Same.—Marriage.*—The owner in fee of certain real estate conveyed

the same in fee, his wife joining in the deed, to his brother, who, having received the title for such purpose, immediately conveyed in fee to the wife and minor daughter of the original grantor. Both deeds were voluntary, the former expressing a consideration in a certain sum, the latter none. After the deeds were recorded, the daughter intermarried with one who had knowledge of the deeds and believed her to be the lawful owner of the land so conveyed to her. The daughter died, leaving one child, the only issue of such marriage; and the child died, leaving its father its sole heir at law.

Held, in a suit by the surviving father of such child for partition, the original grantor still retaining possession, that no trust resulted to such grantor under the deeds.

Held, also, that the marriage of the daughter made her a purchaser for a valuable consideration, and it would be a fraud upon her husband to withdraw the estate passed to her.

Held, also, that the plaintiff was entitled to possession of the land so conveyed to said daughter.....*Ibid*.

W

WARD.

See GUARDIAN AND WARD.

WARRANTY.

See PLEADING, 12.

WAY.

See HIGHWAY.

WEAPON.

See CRIMINAL LAW, 28, 41, 45.

WIDOW.

See DESCENT, 1, 2, 5, 6; PROMISSORY NOTE, 4.

1. *Surviving Second Wife Without Children.—Creditors.*—Where a man dies, leaving surviving him a widow, a second or other subsequent wife, by whom he has no children, and

children by a previous wife, the widow, *as against creditors*, takes the same share of his real estate, by descent, in fee simple, as if a first wife; and at her death this fee simple descends to her said husband's children free from the demands of his creditors. *Louden, Adm'r, v. James et al.*.....69

2. *Partition.—Statute Construed.*—

Where, in an action for partition, there are several tracts of land in which a widow is entitled to an estate for life or in fee simple, and there are tenants in common with her in all or any part of such lands, the act of March 5th, 1859 (2 G. & H. 361), does not give her the absolute right to have her interest in several tracts located in a body, selected by her, on one of them, but confers on the commissioners, acting under the direction of the court, the power, where she has made such selection, to set over to her the tract so selected, if they deem it just and proper to do so. The tenants in common in the several tracts, in lieu of her interest in which she makes such selection, must be the same, and each one's interest must bear the same relative proportion in each tract to the interests of the other tenants. *Hanlon v. Waterbury*.....163

3. *Same.—Estoppel.—Vendor and Purchaser.*—An administrator, under an order of court granted upon a proper petition, in which it was stated that the decedent left a widow surviving him, sold a certain lot, being one of two tracts of land of which the decedent was seized in fee simple, at his death, for the payment of the debts of the decedent. After the payment of the debts, the widow, with knowledge of all the facts, received the residue of the proceeds of the sale, as a part of the three hundred dollars to which she was entitled, under the statute, as against heirs and creditors.

Held, that the widow was not estopped from claiming her share, as against creditors, of the real estate so sold.

Held, also, that the purchaser at such sale, or his vendee, could not claim to be a purchaser in good faith, believing that he was acquiring an unincumbered title to the whole lot.

Held, also, that the widow's entire in-

terest, as against creditors, in all her husband's real estate could not be assigned to her in one body, upon her selection, from the other unsold tract, in which she as widow was tenant in common with the children and heirs at law of her husband.....*Ibid.*

4. *Will.*—*Statutory Allowance of \$300.* A surviving wife who has accepted the provision made for her by the will of her deceased husband is entitled also to the sum of \$300 allowed her by section 21, 1 G. & H. 295. *Dunham v. Tappan et al.*.....173

WIFE.

See HUSBAND AND WIFE.

WILL.

See WIDOW, 4.

1. *Mistake.—Evidence.*—Parol evidence, or evidence *dehors* the will, is not admissible to correct an alleged mistake of a testator which is not apparent upon the face of the will. *McAlister et al. v. Butterfield et al.* 25
2. *Same.*—A testator, having devised certain real estate to his widow for life and directed that at her death it should be sold and the proceeds divided equally between his heirs, and bequeathed his personal estate to be equally divided between his lawful heirs, directed that the remainder of his real estate be sold and the proceeds "equally divided between my lawful heirs, after deducting the amounts that the following named heirs have received: * * * My daughter F. has received \$2,100; J. has received \$1,600. I want my heirs to be made equal, and the remainder of my estate to be equally divided between my heirs."

Complaint by F. and J. against the widow, the other heirs and devisees, and the executor, alleging, that the testator recited and charged said sums against the plaintiffs erroneously, through mistake and inadvertence; that, in truth, F. had received only \$300, and J. had received no advancement whatever. Prayer, that the mistake be corrected, and that, in making distribution under the will, the advancement

charged to J. be excluded, and that charged to F. reduced to \$300.

Held, that the matter sought to be contradicted was not simply the recital of a fact (although if merely such the plaintiffs would, it seemed, have been estopped from denying the truth of the recital), but also a limitation upon the interest of the plaintiffs in the estate devised.

Held, also, that evidence *dehors* the will was not admissible to prove the alleged mistake.

Held, therefore, that the complaint was bad on demurrer.....*Ibid.*

3. *Probate of.—Pleading.*—A complaint seeking probate of an alleged will, averring that the defendant pretended that such a will as was described, and of which a copy was set out, was not duly executed, did not allege that defendant had the custody of the will, nor did the plaintiff offer to produce it.

Held, that the complaint was bad on demurrer. *Duckworth et al. v. Matlock et al.*.....380

WITNESS.

1. *Child under Ten Years.—Competency.—Examination.*—Where the competency of a child under ten years of age as a witness is challenged, the decision of the court must be founded on the judge's own opinion, derived exclusively from an examination made by him in public as part of the trial. *Simpson v. The State*.....90
2. *Same.—Criminal Law.—New Trial.*—On the trial of an indictment for a rape, the prosecuting witness was a child only six years old at the time of the trial, sixteen months after the alleged offense. The competence of the witness being challenged, the court examined her, and, not being satisfied, appointed two gentlemen, who retired with the child to a private room, and, after some time, returned and reported to the court, that, "in their opinion, her testimony ought to be heard, but received with great allowance;" whereupon she was allowed to testify, over the defendant's objection. *Held*, that for this action of the court the defendant was entitled to a new trial.

Held, also, that the court should have acted on its own judgment, upon a public examination when the defendant was present.

Held, also, that courts should be very cautious in admitting as witnesses children of such tender years...*Ibid*.

3 *Number of Witnesses*.—A party cannot lawfully be limited by the court to one witness upon a vital point in issue. *Hubble v. Osborn*. 249

4. *Character*.—*Remarks of Court before Jury*.—A cross interrogatory was put to a witness which had been already twice propounded and answered; and the court, upon objection made, refused to allow a third answer, remarking, in the hearing of the jury, that "when a witness of his standing and character had answered a question twice, it was sufficient."

Held, that, under the circumstances of the case, there was no error. *Aylesworth et al. v. Brown et al.*.....270

5. *Practice*.—*Supreme Court*.—*Credibility of Witnesses*.—Where upon appeal to the Supreme Court the question is one of the credibility of

witnesses solely, the action of the lower court will stand. *The Columbus & Ind'polis Central Railway Co. v. Farrell*.....408

6. *Discredit of Witness by the Court*.—An attempt in an instruction to the jury in a criminal case to cast discredit upon a medical witness because he had attended the trial from a neighboring state to testify in behalf of the defendant, with the expectation that his expenses would be paid by the defendant or others for him, the defendant being a stranger to such witness, was disapproved. *Bradley v. The State*.....492

WORDS.

Definition of. See CRIMINAL LAW, 6, 46.

Provocation by. See CRIMINAL LAW, 4.

WRITTEN INSTRUMENT.

See PLEADING, 3.

Alteration of. See PRINCIPAL AND SURETY, 7.

END OF VOLUME XXXI.

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